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*Reed E. Hundt designated Chairman effective November 29, 1993.

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CB Radio Store NAL/Acct. No.: 315DS0001
Road Forks, New Mexico

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 10, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by the CB Radio Store (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's December 2, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 302(b), and Section 2.815(b) of the Commission's Rules, 47 C.F.R. § 2.815(b). As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $5,600.

II. BACKGROUND

3. On September 23, 1992, an FCC inspector from the Commission's Douglas Office visited the CB Radio Store at the Shady Grove Truck Stop in Road Forks, New Mexico. The inspector conducted himself as a member of the general public and requested information on the purchase of an external radio frequency power amplifier (CB linear amplifier). A store employee displayed a Blue Streak 150 mobile CB linear amplifier and offered to sell it to the inspector for $129.95.

4. On October 2, 1992, pursuant the forfeiture provisions under Section 503(b) of the Act, 47 U.S.C. § 503(b), and the authority delegated under Section 0.314 of the Commission's Rules, the Douglas Office issued a $7,000 Notice of Apparent Liability (NAL) to Petitioner for violating Section 302(b) of the Act, 47 U.S.C. § 302(b). On October 21, 1992, Petitioner responded to the NAL. After review of the response, the Douglas Office issued a Forfeiture Order on December 2, 1992, for $7,000.

5. Petitioner responded to the Forfeiture Order on December 29, 1992, with a request for higher level review. Petitioner denies the violations and requests that the Forfeiture Order be cancelled.

III. DISCUSSION

6. Section 302(b) of the Communications Act provides that "[n]o person shall manufacture, import, sell, offer for sale, or use devices which fail to comply with the regulations promulgated pursuant to this section." Section 2.815(b) of the Commission's Rules prohibits the manufacture, sale or lease, offer for sale (emphasis added) or lease (including advertising for sale or lease), importation, shipment, or distribution for the purpose of selling, leasing or offering for sale or lease of external radio frequency power amplifiers capable of operation on frequencies between 24 and 35 MHz. It is not necessary for a sale to be consummated for a violation to have occurred.

7. In the petition for reconsideration, Petitioner denies that his business stocked, sold, or offered for sale external radio frequency power amplifiers. In support of his claim that his store did not stock external linear radio frequency power amplifiers, Petitioner provided a copy of his store's inventory dated September 1, 1992. This list appears to show no prohibited devices in stock. When the FCC inspector visited the store, however, he noted that the prohibited devices were kept in a locked area separate from the area where the store's regular inventory was displayed. This list is controverted by the FCC inspector's visual sighting of such a device at the time of inspection and at the time the offer for sale was made.

8. Petitioner contends that a violation, if one occurred, was not willful. The term "willful" when used in this context does not imply that the violation was intentional, but merely that the act that resulted in the violation was not created accidentally. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). For example, in the instant case, the prohibited device was displayed to the prospective purchaser with the intent of inducing the viewer to purchase the device.

9. Petitioner requests cancellation of the forfeiture on the basis that the FCC investigator and the employee offering the prohibited device for sale were not identified by name on the NAL. Petitioner further contends that since no sale actually took place, no forfeiture should be applicable. Identification by name of the specific individuals involved in the offer to sell is not necessary. An employer is responsible for the acts of his individual employees when they are performing their duties on behalf of their employer. *See Triad Broadcasting, Inc.*, 96 FCC 2d 1235 (1984). An actual sale need not be completed for a violation to have occurred. As indicated in Section 2.803 of the Commission's Rules, the regulations prohibit an offer for sale in addition to actual sales.

10. Petitioner claims that he has not been given the opportunity to present evidence and, if necessary, to cross-examine "the individual making the allegation". The only allegation involved was the report of the Commission employee who inquired about the availability for sale of CB linear amplifiers. He was an employee of the Commission's Douglas Office. His inquiry was made in the course of the performance of his official duties as an employee of the Commission. The provision of opportunity for a hearing referred to in Section 1.80(g) of the Commission's Rules is a discretionary matter available to the Commission. It is not normally used in cases involving only monetary forfeitures because written rebuttals are permitted as an alternative.

11. Petitioner further complains that none of the four downward adjustment factors were considered when the amount of the forfeiture was determined. He claims to have a history of overall compliance. Petitioner also claims good faith for voluntary disclosure. Denying his prior offers to sell prohibited equipment and denying that he stocked prohibited equipment for sale does not support Petitioner's assertion that he acted in good faith. Addition-

ally, he made no voluntary disclosures at all. Petitioner also claims that his actions constitute a "minor violation" In reviewing whether an action or violation constitutes a "minor violation", the totality of the violator's actions must be examined. Section 2.815(b) of the Commission's Rules prohibits the manufacture, sale, offer for sale, lease, shipment or distribution for the purpose of sale or lease, or importation of any type of external radio frequency power amplifier or amplifier kit capable of operation on any frequency or frequencies between 24 and 35 MHz. This regulation was adopted because use of such amplifiers have been shown to cause widespread disruptive interference to many radio services. Violation of the prohibitions contained in this Rule cannot be considered to be of a minor nature. Furthermore, Section 2.803 of the Commission's Rules specifies that any equipment capable of generating or amplifying radio frequency energy must be granted an equipment authorization prior to marketing. Since the above mentioned external radio frequency power amplifiers cannot be marketed, they cannot be granted an equipment authorization and cannot be legally operated under the Commission's current rules.

12. Petitioner claims that he should be permitted to show that a failure to cancel or mitigate the $7,000 forfeiture would create a financial hardship. Ability to pay is one of the factors required to be considered in setting the forfeiture amount in a violation case. *See* 47 U.S.C. § 503(b)(2)(D). Petitioner may document a claim of financial hardship by submitting copies of federal income tax returns for the past three years or equivalent documentation such as audited company balance sheets, profit and loss statements, or similar documents covering the past three years. Since Petitioner has failed to provide such documentation, we are unable to consider ability to pay in determining a final forfeiture amount.

13. We note that we have no record of prior marketing violations by Petitioner. Based on this lack of a prior history of violation, we are adjusting the forfeiture downward to $5,600.

IV. CONCLUSION

14. For the reasons cited above, we reduce the finding of liability for monetary forfeiture to $5,600. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

15. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that CB Radio Shop FORFEIT to the United States the sum of five thousand six hundred dollars $5,600 for the willful violation of Section 302(b) of the Communication Act and Section 2.815(b) of the Commission's Rules.

16. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that CB Radio Store shall make such payment within 30 days of receipt of this ORDER.[1] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. 315DS0001, and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

17. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to: CB Radio Store, P.O. Drawer E, Road Forks, New Mexico 88045, and one copy to Petitioner's counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Petitioner may contact the Commission's Debt Collection Officer in Billings and Collections Branch, Stop Code 1110A2, 1919 M Street N.W., Washington, DC 20554 if it is unable to pay the full amount within the period designated above.

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
January 3, 1994

Released: January 10, 1994

Ronald G. Daniels
P.O. Box 3364
Arlington WA 98223

Dear Mr. Daniels:

This is in response to your January 11, 1993, letter in which you request reconsideration of the amount of the monetary forfeiture No. 315FE0016 imposed for use of Marine Channel 70 (156.525 MHz) for routine intership voice communications from your commercial fishing vessel.

Over seven years ago marine channel 70, 156.525 MHz, was withdrawn from the group of channels allowed for voice communications and reserved for safety and distress calling by means of digital selective calling (DSC). DSC is a technique for ship-to-shore and ship-to-ship calling by means of very brief sequences of digital codes. Receivers in the system are designed to respond only to one or more particular digital codes. This results in a system of calling similar to a land telephone whereby only a particular one or limited group of receivers are activated by a particular digital code. For the system to be effective, the particular frequency used for digital selective calling must be kept free of interference. The system will not function properly on a channel that is simultaneously being used for voice communications. Since the system of digital selective calling is intended to permit rapid alerting of other vessels and shore stations in event of an emergency, keeping the frequency clear of all interference is vital to the safety of vessels in the area. When the frequency is used for voice communications the digital calling system cannot be used effectively. Thus, using the channel reserved for distress and safety calling using DSC for voice communications jeopardizes the safety of all vessels in the area.

We note that the transmissions you made on the prohibited channel were properly identified and you made no effort to conceal the identity of your station. This tends to support your contention that you were unaware that voice communications were not permitted on that channel. We accept that you did not intend to commit a violation. The transmission itself is, however, the willful act which is the basis for a forfeiture. The Commission has reconsidered the usual forfeiture for this kind of violation. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the fact that we have no record of prior violations on your part, we have decided to cancel the forfeiture. Therefore, Forfeiture No. 315FE0016 is hereby cancelled. Because of the potential for interfering with distress and safety communications, any future violations of this kind will not be treated lightly.

Sincerely

Richard M. Smith
Chief, Field Operations Bureau

CC:
Ronald G. Daniels
P.O. Box 5554
Ketchikan, AK 99901

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
January 3, 1994

Released: January 10, 1994

Patrick Lavis, Esquire
1139 Exchange Street
Astoria, Oregon 97103

Re: NAL/Acct. No. 215FE0034

Dear Mr. Lavis:

This responds to your letter of September 4, 1992, requesting higher level review of a notice of forfeiture issued to your client, James R. Wells. The file number is 215FE0034. You requested that the matter be dismissed.

We have complied with your request to review the case. Your letter fails to present any new facts or other information that was not previously considered at the time the forfeiture notice was issued.

You claim that the facts fail to establish any willful intent on the part of Mr. Wells to violate any regulations. This is true, but the transmissions were of themselves willful acts. Section 312(f)(1) of the Communications Act defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ..." 47 U.S.C. § 312(f)(1). *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). The transmissions did not occur because someone inadvertently pressed the microphone button. The voice communications were not made on the channel reserved for digital selective calling due to the operator inadvertently setting the channel switch to a wrong channel. The operator knew he was transmitting when he spoke into the microphone.

The amount of the forfeiture is that which was appropriate for the level of violations detected. Your request that the forfeiture be dismissed is denied. The Commission has, however, reconsidered and reduced the usual forfeiture for these kinds of violations. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the fact that there is no record of prior violations of this type on the part of Mr. Wells, we are reducing the amount of the forfeiture to $100.

Pursuant to Section 503 of the Act, 47 U.S.C. § 503, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, your client is ORDERED to pay $100. Payment should be by check or similar instrument made payable to the Federal Communications Commission. To assure proper credit, place the account number 215FE0034 on the remittance. Mail it to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
January 3, 1994

Released: January 10, 1994

Charles Mauws
P.O. Box 1037
Silverdale, WA 98383

In reply, refer to:
215FE0193

Dear Mr. Mauws:

This is in response to your letter of October 30, 1992, requesting reconsideration of the forfeiture No. 215FE0193 dated October 2, 1992, assessed against you for operating an unlicensed coast station.

We have reviewed the file in accordance with your request. We find no new facts in your October 30 letter that were not considered prior to issuance of the forfeiture notice. Therefore, the forfeiture will not be cancelled. The fact that the station may have been used to provide assistance to vessels does not justify operation without a license. A restricted radiotelephone operator permit is a radio *operator* authorization and cannot substitute for a radio *station* license. Furthermore, a *ship* station license cannot be used as an authorization to operate a station on land. Your use of a long-expired ship station call sign to identify your unlicensed coast station in an apparent attempt to mask its unlicensed status would have violated Section 80.102 of the Commission's rules if the station had been licensed.

In your letter you claim that you are unable to pay the forfeiture. Ability to pay is one of the factors we are required to consider in setting a forfeiture amount. However, since no documentation accompanied your letter we are unable to evaluate your claim.[1]

The Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). Based on the fact we have no record of prior violations on your part, we are reducing the forfeiture amount to $400. You are ordered to pay $400. The forfeiture should be paid by check or money order payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215FE0193 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

[1] Claims of inability to pay should be documented by copies of your federal income tax return for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tatung Company of America, Inc.
Long Beach, California

NAL ACCT. NO. 215CG0033

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 10, 1994

Field Operations Bureau:

1. The Bureau has before it a Petition for Reconsideration filed by Tatung Company of America, Inc. (Tatung), pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b) requesting reconsideration of the Chicago Field Office's June 26, 1992, action finding Tatung liable for a monetary forfeiture in the amount of $700 for violating Section 302 of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 U.S.C. § 2.803. As explained below, we are cancelling the monetary forfeiture penalty.

2. On April 6-9, 1992, Tatung Company of America, Inc. exhibited a "Laptop-TNB500" at the Spring '92 COMDEX computer trade show in Chicago, Illinois. At the trade show, an FCC investigator from the Chicago Office inspected Tatung's radio electronic equipment and did not see a label with the FCC ID on Tatung's Laptop-TNB500.

3. On May 26, 1992, Tatung was issued a Notice of Apparent Liability which proposed a monetary forfeiture in the amount of $7000 for violating Section 302 (b) of the Communications Act and Section 2.803 of the FCC's Rules by marketing computers that had not been authorized by the FCC, 47 U.S.C. § 302(b), 47 C.F.R. § 2.803. Tatung responded by letter dated June 11, 1992. Tatung submitted a copy of the FCC's grant of equipment authorization for a laptop computer under FCC ID BJMTNB500-20. Upon review of the response, the Chicago Office issued Tatung a Notice of Forfeiture (NOF) for $700 on June 26, 1992. The NOF provided no rationale for reducing the forfeiture, nor did it discuss the evidence of certification provided by Tatung.

4. Petitioner submitted evidence demonstrating that it did not violate § 2.803. This evidence does not appear to have been properly weighed or considered. We are, therefore, cancelling the forfeiture.

5. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.80 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by the Tatung Company of America, Inc. is GRANTED.

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested, to Tatung Company of America, Inc., 2850 El Presidio Street, Long Beach, CA 90810.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN SATELLITE SYSTEMS, INC. Ref. No. DS-1353

and

LIBERTY MEDIA CORPORATION

Request for Declaratory Ruling
Concerning Section 310(b)(4)
of the Communications Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1993; Released: January 11, 1994

By the Chief, Domestic Facilities Division:

1. Southern Satellite Systems, Inc. (SSSI) and its parent corporation, Liberty Media Corporation (LMC) request a declaratory ruling that the appointment of Vivian J. Carr, a citizen of the United Kingdom, as a corporate officer of LMC and subsidiaries other than those directly holding common carrier or broadcast licenses will not adversely affect the public interest under Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4), with respect to the common carrier radio licenses held by SSSI.[1] SSSI/LMC's request was placed on public notice on September 22, 1993.[2] No comments were filed. For the reasons discussed below, we find, pursuant to Section 310(b)(4), that the appointment would not adversely impact the public interest.

2. LMC plans to appoint Vivian J. Carr, a citizen of the United Kingdom, as Vice President of LMC, and, possibly, as an officer of certain subsidiaries. Ms. Carr would not be a corporate officer of SSSI or any subsidiary which itself would hold common carrier or broadcast licenses. LMC indicates that Section 310(b)(3)[3] of the Communications Act would not be implicated here as Ms. Carr would not be directly involved in any common carrier activities of SSSI or other subsidiaries holding common carrier licenses, or of any future subsidiary which may hold one or more broadcast licenses.

3. Section 310(b)(4) of the Communications Act provides that common carrier radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation or which any officer or more than one-fourth of the directors are aliens. . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

4. The restrictions of Section 310(b)(4) reflect national security concerns and are designed to prevent the participation of aliens in certain domestic radio activities.[4] Nevertheless, it is within the Commission's discretion to allow a foreign national to serve as an officer of a parent corporation if such an appointment will not adversely affect the public interest.[5]

5. SSSI/LMC represents that Ms. Carr will be appointed Vice President of LMC and, possibly, as an officer of other subsidiaries. SSSI/LMC further states that Ms. Carr will not be a corporate officer of SSSI or any other subsidiary which itself would hold a common carrier or broadcast license. Therefore, Ms. Carr will not have any responsibilities with respect to any common carrier facilities licensed to SSSI or other subsidiaries holding common carrier licenses, nor any future subsidiary which may hold one or more broadcast licenses. SSSI/LMC submits that the desired appointment of Ms. Carr as Vice President of LMC would not in any way threaten United States security interests or otherwise disserve the public interest.

6. SSSI/LMC states that Ms. Carr immigrated to the United States in July 1969 where she became legal secretary to the general counsel to The Denver Corporation, a subsidiary of King Resources, from December 1969 to December 1970. From then until December 1972, she was a legal secretary at the law firm Sherman & Howard in Denver. Therafter, until May 1975, she was legal secretary to the general counsel at Banker's Union Life Insurance Company. From May 1975 to October 1986, Ms. Carr was a legal assistant for Frontier Airlines, Inc. Following that, until March 1991, she was a legal assistant for Tele-Communications, Inc. From March 1991 to the present, Ms. Carr has been employed by LMC, most recently as Director of Investor Relations. Ms. Carr has been married to Raymond S. Carr, a U.S. citizen, for the past 13 years.

7. In light of the facts set forth in SSSI/LMC's request, we find that the appointment of Ms. Carr as Vice President of LMC or as an officer in subsidiaries not holding common carrier licenses would not require the revocation of the common carrier licenses held by SSSI.

8. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Southern Satellite Systems,

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[1] Southern Satellite Systems, Inc. is the licensee of Earth Stations WK42, E7990 and E910311.

[2] Public Notice, Report No. DS-1353 (September 22, 1993).

[3] Section 310(b)(3) of the Communications Act provides that common carrier licenses shall not be granted to or held by:

> any corporation of which any officer or director is an alien or of which mre than one-fifth of the capital stock is owned of record or voted by aliens or their reporesentatives or by a foreign government or representative therof or by any corporation organized under the laws of a foreign country.

[4] *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 FCC 2d 511, 516-517 (1985), *recon.*, 1 FCC Rcd 12 (1986).

[5] *See* International Telephone and Telegraph Corp., 67 FCC 2d 604 (1978); Contel Corporation, 3 FCC Rcd 5795 (Dom. Fac. Div. 1988).

Inc.'s and Liberty Media Corporation's request for a declaratory ruling IS GRANTED, and the Commission has no legal objection under Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4), to the appointment of Vivian J. Carr as Vice President to Liberty Media Corporation.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION File No. 53-DSS-AL-93

Application for assignment of license for Spacenet II

ORDER AND AUTHORIZATION

Adopted: December 28, 1993; Released: January 11, 1994

By the Chief, Domestic Facilities Division:

1. GTE Spacenet Corporation (GTE) has filed an application for the assignment of the license for its Spacenet II domestic fixed-satellite[1] from GTE to GE American Communications, Inc. (GE Americom). The application was placed on public notice.[2] No comments or petitions were filed. For the reasons discussed below, the application is granted.

2. GE Americom is a wholly-owned subsidiary of General Electric Company and GE Americom's principal business is satellite communications. GE Americom is the licensee of the Satcom series of domestic fixed-satellites. Further, GE Americom represents that it is a qualified FCC licensee as a matter of record. In addition, GTE asserts that this assignment would be in the public interest. GE Americom has already acquired all the transponders on the Spacenet II satellite from the previous owners and intends to use the satellite to continue to serve existing customers. Moreover, GE Americom intends to use Spacenet II as an interim replacement satellite for its soon-to-be retired Satcom 2R satellite until the regular replacement satellite, GE-1, is operational.

3. GE Americom's qualifications to construct, launch and operate a domestic fixed-satellites system are a matter of record before the Commission. GE Americom's intended use of this satellite, as in interim replacement for its Satcom 2R, will provide continuity of service to its customers. We find that grant of this application is in the public interest.

4. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, GTE Spacenet Corporation's application for consent to assignment of the authorization for the Spacenet II domestic fixed-satellites IS GRANTED. All existing terms and conditions applicable to this authorization shall remain in full force and effect.

5. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Southern Pacific Communications, Co., 84 FCC 2d 650 (1981).
[2] *See* Public Notice, Report No. DS-1347 (September 1, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 50-DSS-STA-93

Application for Special Temporary Authority for Galaxy I Domestic Fixed-Satellite License

ORDER

Adopted: December 30, 1993; Released: January 11, 1994

By the Chief, Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has filed an application for special temporary authority to continue operating its Galaxy I domestic fixed-satellite for an additional six months beyond its current license term. This application was placed on public notice.[1] No comments or petitions were filed. For the reasons set forth below, Hughes's application for special temporary authority is granted.

2. Galaxy I was launched in June 1983 and commenced service in August 1983. It is operating at 133^0 W.L. Hughes has been authorized to replace the Galaxy I satellite at 133^0 W.L. The initial replacement satellite, Galaxy I-R,[2] was destroyed during its launch in August 1992. Hughes filed for, and was granted, authority to construct, launch and operate a substitute satellite, Galaxy I-R(S).[3] Hughes is requesting a six-month special temporary authority to continue operating its Galaxy I satellite beyond its license term but within the conditions of that license at 133^0 W.L. This will enable Hughes to continue to provide service to its customers pending final construction and launch of its Galaxy I-R(S) satellite.

3. We will extend the license term of Galaxy I through March 31, 1994. Grant of this special temporary authority will provide an opportunity for the public to continue receiving services from Galaxy I. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of this application will serve the public interest, convenience and necessity.

4. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Application File No. 50-DSS-STA-93 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to operate the Galaxy I satellite through March 31, 1994 in compliance with all other terms and conditions of its license.

5. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[1] *See* Public Notice, Report No. DS-1323 (June 23, 1993).
[2] *See* Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988).
[3] *See* Hughes Communications Galaxy, Inc., 8 FCC Rcd 5089 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 51-DSS-STA-93

Application for Special Temporary Authority for Galaxy II Domestic Fixed-Satellite License

ORDER

Adopted: December 30, 1993; Released: January 11, 1994

By the Chief, Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has filed an application for special temporary authority to continue operating its Galaxy II domestic fixed-satellite for an additional six months beyond its current license term. This application was placed on public notice.[1] No comments or petitions were filed. For the reasons set forth below, Hughes's application for special temporary authority is granted.

2. Galaxy II was launched in September 1983 and commenced service in October 1983. It is operating at 74^0 W.L. Galaxy II continues to serve many customers and has a fuel life that will extend three to six months beyond its license term. At that time, Galaxy II will be removed from service. In order to best meet the needs of its customers and to maximize the use of this satellite, Hughes is requesting a six-month special temporary authority to continue operating its Galaxy II satellite beyond its license term but within the conditions of that license at 74^0 W.L.

3. We will extend the license term of Galaxy II through April 30, 1994. Grant of this special temporary authority will provide an opportunity for the public to continue receiving services from Galaxy II. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of this application will serve the public interest, convenience and necessity.

4. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Application File No. 51-DSS-STA-93 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to operate the Galaxy II satellite through April 30, 1994 in compliance with all other terms and conditions of its license.

5. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Public Notice, Report No. DS-1323 (June 23, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the
requirements in Section 80.453
of the Rules to permit public
coast stations WHX740, WHD813,
KQU440, KIL928 and KIL929 to
serve mobile vehicles on land.

ORDER

Adopted: December 21, 1993; Released: January 11, 1994

By the Chief, Special Services Division:

I. INTRODUCTION

1. Cleveland Communications, Inc. (Cleveland), licensee of very high frequency (VHF) public coast stations WHX740, WHD813, KQU440, KIL928 and KIL929, requests a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station licenses to permit it to serve a limited number of land mobile vehicles on a secondary basis. This action grants the requested waiver.

II. BACKGROUND

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. The Commission stated: "The comments point out that maritime frequencies in many areas of the country are already extremely congested. In other areas of the country, however, lakes and rivers freeze over and the seasonal factors greatly affect capacity." *Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic that was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

III. DISCUSSION

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. The stations in question are located in Ohio and New York, on the banks of Lake Erie, and are subject to seasonal climate conditions. Marine traffic for these stations generally serves recreational boats with heaviest use during the months of June to September, and during weekends and holidays the rest of the year. In support of its request, Cleveland indicates that it will provide services to a limited number of land vehicles, particularly during periods when there is limited or no maritime traffic.

4. We are waiving the rules to permit Cleveland to provide subsidiary service to an estimated twenty-five land vehicles per station as requested. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Cleveland must be type accepted for use in the Maritime Services (Part 80), the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22) and must be capable of operating only on the maritime public correspondence channel authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or control panel "blocks" to prevent operation on other channels. The radios installed in vehicles must not be capable of being tuned by control panel operation to any channel other than that authorized for the station providing communications services. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rule Making* in PR Docket No. 86-2, 51 Fed. Reg. 4525 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system" basis. It proposed that land vehicles use a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a

[1] *See, e.g., In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992), *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992), *In the Matter of Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land*, 8 FCC Rcd 3061 (1993).

system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the licenses of Cleveland will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

IV. CONCLUSION

7. In view of the above, IT IS ORDERED that the request for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station licenses WHX740, WHD813, KQU440, KIL928 and KIL929 submitted by Cleveland Communications, Inc. to serve land mobile vehicles on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the
requirements in Sections 80.303
and 80.453 of the Rules to permit
public coast station WHU487 to
cease safety watch on 156.800 MHz
and serve mobile vehicles on land.

ORDER

Adopted: December 21, 1993; Released: January 11, 1994

By the Chief, Special Services Division

1. Holbrook Industries, Inc. (Holbrook), licensee of very high frequency (VHF) public coast station WHU487, requests a waiver of Sections 80.303 and 80.453 of the Rules, 47 C.F.R. §§ 80.303 and 80.453. Holbrook also requests modification of its station license to permit it to cease the safety watch on 156.800 MHz (Marine VHF Channel 16) and serve a limited number of land mobile vehicles on a secondary basis. This action grants the requested waivers.

2. The general requirement for coast station safety watches is that "each coast station operating in the [VHF] band and serving rivers, bays and inland lakes... must maintain a safety watch on the frequency 156.800 MHz."[1] This requirement may be waived when "Government stations maintain a watch on 156.800 MHz over 95% of the coast station's service area."[2] In order to receive this exemption, the coast station must submit a chart showing its receiving service area and the receiving service area of the Government station providing the safety watch. Holbrook has submitted a chart demonstrating that all of its receiving service area falls within areas where the 156.800 MHz safety watch is provided by the U.S. Coast Guard. For this reason, we grant Holbrook the requested waiver of the safety watch requirement.

3. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. *See Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[3] The Commission based the waivers on the fact that each station had limited marine traffic that was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

4. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. WHU487 is located in Ohio, on the shore of Lake Erie, and is subject to seasonal climate conditions. Marine traffic for WHU487 generally serves recreational boats with heaviest use during the months of June to September, and during weekends and holidays of the rest of the year. In support of its request, Holbrook indicates that it will provide services to a limited number of land vehicles, particularly during periods when there is limited or no maritime traffic.

5. We are waiving the rules, therefore, to permit Holbrook to provide subsidiary service to up to 100 land vehicles as discussed above. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

6. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by Holbrook must be type accepted for use in the Maritime Services (Part 80) or the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22), and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WHU487. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

7. In the *Notice of Proposed Rules Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4525 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast sta-

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[1] 47 C.F.R. § 80.303(a).
[2] 47 C.F.R. § 80.303(b).
[3] *See, e.g., In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992), *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992), *In the Matter of Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land*, 8 FCC Rcd 3061 (1993).

tion's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of Holbrook will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

8. In view of the above, IT IS ORDERED that the exemption from Section 80.303 of the Rules, 47 C.F.R. § 80.303, for public coast station WHU487 to cease the safety watch on 156.800 MHz IS GRANTED. IT IS FURTHER ORDERED that the request for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WHU487 submitted by Holbrook Industries, Inc. to serve land mobile vehicles on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 6 and 7 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of the
requirements in Section 80.453
of the Rules to permit public
coast station WLO to serve
mobile vehicles on land.

ORDER

Adopted: December 21, 1993; Released: January 11, 1994

By the Chief, Special Services Division

1. Mobile Marine Radio, Inc. (MMR), licensee of very high frequency (VHF) public coast station WLO, requests a waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of its station license to permit it to serve a limited number of land mobile vehicles on a secondary basis. This action grants the requested waiver.

2. In the *Report and Order* in PR Docket No. 86-2, 1 FCC Rcd 1312 (1986) (*Report and Order*), the Commission declined to adopt rules that would have permitted VHF public coast stations to serve vehicles on land on a subsidiary basis. The Commission found that conditions in the VHF public coast station market are not sufficiently homogeneous to permit such service nationwide. *See Report and Order* at paragraph 7. Nevertheless, the Commission recognized that "there may be cases where individual stations or systems of stations may have excess capacity on an hourly, daily or seasonal basis and could design a subsidiary service to vehicles which would ensure against interference to, or derogation of, maritime communications." *Report and Order* at paragraph 8. The Commission indicated that it would consider such requests for waiver of the rules on an *ad hoc* basis. The Commission has since granted several such waivers.[1] The Commission based the waivers on the fact that each station had limited marine traffic that was variable in terms of peak usage. The Commission allowed land mobile service to be offered to a limited number of vehicles during off peak periods on a strictly secondary basis. The Commission has received no complaints about these operations.

3. Authorization of service to land vehicles must be carefully scrutinized to ensure that maritime public correspondence, which is part of a safety service, is not impaired. In support of its request, MMR indicates that it will provide services to a limited number of land vehicles, only during times of light maritime communications traffic. There is sufficient capacity in the frequencies WLO uses to serve land vehicles without degradation to maritime communications.

4. We are waiving the rules, therefore, to permit MMR to provide subsidiary service to up to 100 land vehicles as discussed above. The waiver is contingent, however, on the conditions set forth below. Furthermore, such subsidiary service must cease within thirty days of the date of written notice if the Commission's staff determines that maritime communications are being impaired.

5. To minimize the potential for interference with other maritime safety or operational communications, the radio equipment installed in vehicles served by MMR must be type accepted for use in the Maritime Services (Part 80) or the Private Land Mobile Services (Part 90), or the Public Mobile Service (Part 22), and must be capable of operating only on the maritime public correspondence channels authorized for use by the public coast station. The mobile radios installed in vehicles may be crystal controlled with only the appropriate crystals installed, or frequency synthesized equipment with switch or front panel "blocks" to prevent operation on other channels. The radios installed in the vehicles must not be capable of being tuned by front panel operation to any channel other than those authorized for station WLO. Electrical or mechanical modifications of equipment beyond the scope of Class I permissive changes are not necessary to satisfy this condition. Therefore, no filing with the Commission should be required regarding such changes. *See* Section 2.1001 of the Rules, 47 C.F.R. § 2.1001. Our intent is to prevent equipment installed in vehicles from operating on unauthorized frequencies by merely tuning such frequencies with external controls.

6. In the *Notice of Proposed Rules Making* (*NPRM*) in PR Docket No. 86-2, 51 Fed. Reg. 4525 (1986) at paragraph 8, the Commission indicated its intention to license subsidiary services on a "system basis." That is, it proposed that land vehicles utilize a public coast station's excess capacity to operate under the public coast station's license. Vehicle identification must consist of the public coast station's call sign and a numeric or alphabetical unit identifier. This increases the public coast station's incentive to control the vehicles' communications because enforcement efforts will focus on the public coast station licensee rather than on individual vehicle operators. Also, authorizing subsidiary service on a system basis reduces paperwork requirements for both the public and the Commission by eliminating the need for separate licenses for each vehicle. Therefore, the license of MMR will be modified accordingly. This method of licensing and identification will ensure that the licensee will take all necessary steps to prevent impairment of maritime services, consistent with the concerns expressed in PR Docket No. 86-2.

7. In view of the above, IT IS ORDERED that the request for waiver of Section 80.453 of the Rules, 47 C.F.R. § 80.453, and modification of public coast station license WLO submitted by Mobile Marine Radio, Inc. to serve land mobile vehicles on a secondary basis, IS GRANTED subject to the conditions set forth in paragraphs 5 and 6 above and subject to the condition that no impairment or interference is caused to maritime communications services.

FEDERAL COMMUNICATIONS COMMISSION

[1] *See, e.g., In the Matter of Global Communications, Inc.*, 7 FCC Rcd 2238 (1992), *In the Matter of Custard, Inc. Request for waiver of Section 80.453 of the Rules to permit public coast station KFN to serve mobile vehicles on land*, 7 FCC Rcd 4515 (1992), *In the Matter of Request for waiver of the requirements in Section 80.453 of the Rules to permit public coast station WHU638 to serve mobile vehicles on land*, 8 FCC Rcd 3061 (1993).

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fred B. Lott — FP Case No. 93F571

Request for A Finder's Preference
Private Land Mobile Radio Services
in Fort Worth, Texas

ORDER

Adopted: December 28, 1993; Released: January 11, 1994

By the Deputy Chief, Private Radio Bureau, Licensing Division:

1. On October 15, 1993, Uniden America Corporation ("Uniden") filed a petition for reconsideration challenging a Notice of Cancellation issued to Uniden regarding SMR station WNPW701 and a finder's preference award issued to Fred B. Lott, both dated September 16, 1993. For the reasons that follow, Uniden's petition is denied.

2. The facts in this dispute are uncontested. Uniden constructed an SMR Station more than five miles from the location for which it was licensed. Fred B. Lott, on April 30, 1993 requested a finder's preference for Station WNPW701 because the station has never been constructed in accordance with the station's authorization.[1]

3. By letters dated September 16, 1993, the Commission staff cancelled Uniden's license and awarded Fred B. Lott a finder's preference. The Notice of Automatic License Cancellation stated that Uniden admitted its failure to construct at the licensed location, and that failure to construct in substantial accordance with licensed parameters results in automatic cancellation of a license citing *Report and Order*, 6 FCC Rcd 7297, 7299 (1991)(Paragraph 9).

4. Uniden now argues that the Commission staff failed to consider its argument that it constructed in substantial accordance with its licensed parameters, and that the public interest as well as the policy behind finder's preference favor modifying Uniden's license rather than cancelling its license because appoximately 300 users operate on its station.

5. Without discussing the disparity between its licensed location and the site where it constructed, Uniden has proffered a letter, written by a party in another license cancellation proceeding, requesting that the Chief of Compliance for the Private Radio Bureau allow a station constructed one fifth of a mile from its licensed coordinates to remain licensed.[2] Uniden asserts that the Compliance Branch eventually granted the relief sought. The distances, however, are not comparable.

6. The integrity of our channel reuse program requires that licensees build at their licensed location. As a rule of thumb, construction more than one second, (60 feet), away from the licensed location is not in accordance with the station's authorization.

7. Uniden also asserts that the Commission's holding in *Drexel Hill Associates*, 1 RR 2d 977(1964) is controlling. In the early 1960's, the Commission allowed a broadcast station to correct its application after it constructed its station not totally in accordance with its construction permit. The Commission determined that the licensee's errors (relating to antenna heights, HAAT) were *de minimus*. In contrast, Uniden's construction five miles from its licensed location is not *de minimus*.

8. Uniden also argues that the purpose of the finder's preference program and the public interest favor permitting Uniden to correct its error rather than cancelling its authorization, because approximately 300 users utilize the station at issue. The finder's preference program is not only designed to recover unused frequencies, but to foster compliance with Commission rules. If a finder demonstrates a rule violation which resulted in the automatic cancellation of a target license, the finder is entitled to a preference. The public interest is furthered by encouraging this private complement to the Commission's compliance efforts. *See, Report and Order*, 6 FCC Rcd 7297, 7302(1991)(paragraph 30).

9. For the reasons discussed above, IT IS ORDERED that the petition for reconsideration filed October 15, 1993 by Uniden America Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

[1] On reconsideration, Lott asserts that Uniden's antenna is constructed hundreds of feet above its authorized antenna height. This information was not included in Lott's original preference request.

[2] Attachment A to Uniden's Petition for Reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 13 of the
Commission's Rules

ORDER

Adopted: January 3, 1994; Released: January 11, 1994

By the Chief, Private Radio Bureau:

1. Section 13.205 of the Commission's Rules, 47 C.F.R. § 13.205, currently provides that a commercial operator license examination (COLE) manager must give examination credit to an examinee holding certain documents.[1] This procedure is unnecessary and duplicative of a function performed by the Commission license processing staff. We are amending Section 13.205, therefore, to clarify that the Commission rather than the COLE manager will grant examination credit when appropriate, and Sections 13.9(c) and 13.13(c) of the Commission's Rules, 47 C.F.R. §§ 13.9(c) and 13.13(c), to clarify that applicants who desire examination credit must submit documentation supporting their request.

2. We also are moving the showing required of an applicant to qualify for a radiotelegraph Six Months Service Endorsement from Section 13.201(c) of the Commission's Rules, 47 C.F.R. § 13.201(c), to Section 13.9(d) of the Commission's Rules, 47 C.F.R. § 13.9(d). This change is intended to clarify that qualification for the Six Month Service Endorsement is determined directly by the Commission rather than the COLE Manager.

3. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, therefore, need not be complied with. Authority for this action is contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

4. Accordingly, Part 13 IS AMENDED, effective February 24, 1994, as set forth in the Appendix attached hereto.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 13 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 13 Commercial Radio Operators

1. The authority citation for Part 13 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

2. Sections 13.9(c) and (d) are revised to read as follows:

§ 13.9 Eligibility and application for new license or endorsement.

(a)***

(b)***

(c) Each application for a new General Radiotelephone Operator License, Marine Radio Operator Permit, First Class Radiotelegraph Operator's Certificate, Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, Ship Radar Endorsement, GMDSS Radio Operator's License or GMDSS Radio Maintainer's License must be accompanied by the required fee, if any, and submitted to the address specified in Part 1 of the rules. The application must include:

(1) An original PPC(s) from a COLEM(s) showing that the applicant has passed the necessary examination element(s) within the previous 365 days, and

(2) A copy of the applicable license(s) when the applicant claims credit for an examination element. The FCC will give credit only as specified below to an applicant holding any of the following documents:

(i) An unexpired (or within the grace period) FCC-issued commercial radio operator license: the written examination and telegraphy Element(s) required to obtain the license held.

(ii) An unexpired (or within the grace period) FCC-issued Amateur Extra Class operator license: Telegraphy Elements 1 and 2.

(d) Each application for a new Six Months Service Endorsement must be submitted to the address specified in Part 1 of the rules. The application must include documentation showing that:

(1) The applicant was employed as a radio operator on board a ship or ships of the United States for a period totaling at least six months;

(2) The ships were equipped with a radio station complying with the provisions of Part II of Title III of the Communications Act, or the ships were owned and operated by the U.S. Government and equipped with radio stations;

(3) The ships were in service during the applicable six month period and no portion of any single in-port period included in the qualifying six months period exceeded seven days;

[1] These documents are an unexpired (or within the grace period) FCC-issued commercial radio operator license, an FCC-issued Amateur Extra Class operator license, and a Proof of Passing Certificate issued within the past 365 days. The purpose of granting examination element credit is to recognize that an examinee previously has passed an examination that covers the same material and, therefore, does not need to demonstrate again his or her knowledge of this material.

(4) The applicant held a FCC-issued First or Second Class Radiotelegraph Operator's Certificate during this entire six month qualifying period; and

(5) The applicant holds a radio officer's license issued by the U.S. Coast Guard at the time the six month endorsement is requested.

(e)***

3. Section 13.13(c) is amended to read as follows:

§ 13.13 Application for a renewed or modified license.

(a)***

(b)***

(c) Each application involving a change in operator class must be made on FCC Form 756. Each application for a commercial operator license involving a change in operator class must be accompanied by the required fee, if any, and submitted to the address specified in Part 1 of the rules. The application must include:

(1) An original PPC(s) from a COLEM(s) showing that the applicant has passed the necessary examination element(s) within the previous 365 days, and

(2) A copy of the applicable license(s) when the applicant claims credit for an examination element. The FCC will give credit only as specified below to an applicant holding any of the following documents:

(i) An unexpired (or within the grace period) FCC-issued commercial radio operator license: the written examination and telegraphy .Element(s) required to obtain the license held.

(ii) An unexpired (or within the grace period) FCC-issued Amateur Extra Class operator license: Telegraphy Elements 1 and 2.

(d)***

(e)***

4. Section 13.201(c) is deleted.

5. Section 13.205 is deleted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Ameron
Broadcasting, Inc.

Licensee, Radio Station WERC(AM)
Birmingham, AL

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1993; Released: January 11, 1994

By the Chief, Mass Media Bureau:

1. The Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's rules, has under consideration a Notice of Apparent Liability (NAL), in the amount of $14,000, 7 FCC Rcd 6537 (MMB 1992), issued on October 8, 1992, to Ameron Broadcasting, Inc. (Ameron), licensee of radio station WERC(AM), Birmingham, AL. On November 6, 1992, Ameron filed a request to reduce or rescind the proposed forfeiture pursuant to Section 1.80 of the Commission's rules. After a thorough review of Ameron's request, we find no basis for reducing or rescinding the forfeiture. Accordingly, this forfeiture is issued pursuant to Section 503(b)(1)(B) and b(4) of the Communications Act of 1934, as amended (47 U.S.C. Section 503(b)(1)(B) and b(4)).

BACKGROUND

2. The Commission issued the $14,000 NAL against Ameron for its apparent willful violation of Section 315(a) of the Communications Act and Section 73. 1940(c) of the Commission's rules and the willful and repeated violation of Section 73.1940(d) of the Commission's rules.[1] As described more fully in the NAL, the Commission determined that on November 5, 1990, WERC talk show hosts Tommy Charles and John Ed Willoughby, censored the appearance of Jack Pratt and discriminated against Pratt in favor of his opponent, Tony Petelos, who had appeared earlier on the same program.[2] Specifically, the Commission found that when Pratt appeared on the station, the hosts limited him to the discussion of an allegedly illegal campaign mailing, while his opponent had been permitted to speak freely upon a number of issues. In addition, Pratt was not allowed to answer the questions asked of him because the hosts regularly cut him off. The Commission also found that WERC failed to place information regarding the appearance of these two candidates in the station's political file.

3. In the instant request, Ameron claims that the Commission failed to take into account the fact that Willoughby offered Pratt, during Pratt's on-air rebuttal of his opponent's accusations, the opportunity to come to the studio to give his remarks. Ameron argues that this fact directly refutes the idea that no "uncensored" opportunity was ever given to Mr. Pratt and suggests that this may "materially alter the Commission's findings." Ameron also argues that the delay between the day of the interview (November 5, 1990) and the filing of the complaint (July 3, 1991) imposed an unreasonable burden on Ameron's attempt to rebut specific factual matters, providing an additional basis for reducing the forfeiture in this case. Ameron presents no argument objecting to the sanction imposed for the political file violation.

DISCUSSION

4. The arguments presented by Ameron do not provide a basis for reducing or rescinding the forfeiture. As a preliminary matter, there is a dispute between the parties as to whether an offer to Pratt to use the facilities was ever made by Willoughby. Ameron asserted that the offer was made over-the-air during Pratt's rebuttal. Pratt declared, however, that such an offer was never made and that he believed that the phone interview was his only recourse for asserting his equal opportunity rights.[3]

5. Whether or not such an offer was made, however, is not germane to our decision. Ameron does not assert that the Commission erred in finding that Pratt's appearance on the talk program was censored by WERC. Ameron appears to argue, instead, that because an additional offer was made to Pratt to appear at the studio for an "uncensored" appearance, WERC should not be held liable, or not be fined the entire base amount, for censoring Pratt's original appearance. This is an incorrect interpretation of the statute. Section 315(a) prohibits stations from censoring any "use" by a candidate, which is defined as an appearance by voice or picture controlled, approved, or sponsored by a candidate, without that candidate's consent.[4] Pratt's original on-air phone call constituted a "use" of the station and WERC's censorship of that use violated the no-censorship provision of Section 315(a).[5] Although an offer of additional time on the station may be relevant to whether a broadcaster complied with Section 315(a)'s equal opportu-

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[1] In *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), recon., 7 FCC Rcd 4611 (1992), the Commission revised and renumbered the various provisions of Section 73.1940 of the Commission's rules. The rules relevant to this matter can now be found at 47 C.F.R. Section 73.1941(e) (Discrimination Between Candidates) and 47 C.F.R. Section 73.1943 (Political File). These particular provisions were renumbered but not revised.

[2] Pratt and Petelos were legally qualified candidates for the Alabama House of Representatives.

[3] We note that Ameron provided, in its instant request, an August 19, 1991, signed statement by the then producer of the talk show, T.D. Ponder, who stated that he heard Willoughby make Pratt an offer to come to the studio to be on the air in person. As explained below, however, whether or not this offer was made, WERC violated the no-censorship provision of the Act by censoring Pratt's original "use" of the station.

[4] *See WANV*, 58 FCC 2d 854, 855-56 (1976). Candidate's consent must be made with full knowledge of his/her rights under Section 315.

[5] There is no evidence before the Commission, nor does Ameron assert, that Pratt consented to waive any of his rights under Section 315(a) by agreeing to go on-the-air during the talk show to rebut Petelos.

nity provision,[6] such an offer does not cure a licensee's previous violation of Section 315(a)'s no-censorship provision.[7] Similarly, WERC's alleged offer of another opportunity to appear on the station does not alter the Commission's finding that WERC discriminated against Pratt in favor of Petelos during the morning talk show by censoring Pratt and not censoring his opponent. Section 73.1940(c) prohibits discrimination between candidates and the offer of an additional appearance does not excuse a previous violation of the rule.

6. Regarding Ameron's claim that the eight-month delay by Pratt in bringing the complaint supports its request for a reduction in the forfeiture amount, we note that the complaint was brought well within the statute of limitations prescribed by the forfeiture statute.[8]

7. Based on the foregoing, WERC has not provided any basis for reducing or rescinding the forfeiture. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Ameron Broadcasting, Inc., licensee of radio station WERC(AM), Birmingham, AL, FORFEIT to the United States the sum fourteen thousand dollars ($14,000) for its willful violation of Section 315(a) of the Communications Act and Section 73.1940(c) of the Commission's rules and its willful and repeated violation of Section 73.1940(d) of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[6] *See Linda Jenness, Socialist Workers Party*, 26 FCC 2d 485 (B. Bur. 1970)(licensee's failure to follow agreed-to format resulted in additional time afforded to petitioner's opponents. Commission granted petitioner's request for additional time).

[7] Whether a "use" is an initial use by a candidate or one pursuant to equal opportunities, a licensee is prohibited from censoring that use. *See WANV*, 58 FCC 2d 854, 856 (1976). Thus, even if Pratt had accepted the alleged offer, both appearances would have been equally subject to the Act's no-censorship provision.

[8] 47 U.S.C. Section 503(b)(6).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3980-M
Public Television against	CSR-3981-M
MW-1 Cable Systems	IN0867

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, petitions on behalf of Greater Dayton Public Television, licensee of Television Broadcast Stations WPTD (Educ., Ch. 16), Dayton, Ohio, and WPTO (Educ., Ch. 14), Oxford, Ohio, were filed with the Commission claiming that MW-1 Cable Systems ("MW-1"), operator of a cable television system serving Economy, Indiana, had declined to carry the stations, even though the cities of license of WPTD and WPTO are within fifty miles of the system's principal headend located at Economy[1] and the stations are therefore "local" signals within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTD and WPTO also request that the Commission not only order MW-1 to carry the signals, but also order the system to carry them on Channels 16 and 14, respectively, the channels on which they broadcast over-the-air. No opposition to these petitions have been filed.

2. In a December 7, 1992 letter declining to carry WPTD and WPTO, MW-1 contends that both stations fail to consistently deliver a good quality signal to the system's headend. In support, it encloses the applicable section of the 1992 Cable Act which defines a good quality signal.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, MW-1 determined WPTD and WPTO's signal strength to be below the requisite level for UHF commercial stations. However, the cable system failed to provide any engineering data to support its determinations. Moreover, such a showing should also follow acceptable engineering practices. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[2]

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determinations reached by MW-1 are insufficient to demonstrate that WPTD and WPTO's signals are not of "good quality" at the cable system's headend.

7. WPTD and WPTO's petitions establish that they are entitled to carriage on the Economy cable system, and they have requested carriage on their over-the-air broadcast channels, as they are permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petitions filed August 2, 1993, by Greater Dayton Public Television ARE

[1] We note that MW-1 has not provided its headend coordinates to WPTD and WPTO as required by Section 76.58(b) of the Rules, despite the stations' letters of December 2, 1992 requesting carriage and follow-up letters of May 28, 1993 specifically requesting such information. Since no oppositions to WPTD and WPTO's complaints have been filed, we accept petitioner's conclusion that MW-1's headend for this system is located at Economy, Indiana and that this community is within 50 miles of both stations' city of license.

[2] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and MW-1 Cable Systems IS ORDERED to commence carriage of WPTD and WPTO on cable channels 16 and 14, respectively, forty-five (45) days from the release date of this *Order* unless MW-1 submits the engineering data required herein to support its asertions of poor signal quality from WPTD and WPTO at MW-1's principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3978-M
Public Television against	CSR-3979-M
Northern Ohio Cable	

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, petitions on behalf of Greater Dayton Public Television, licensee of Television Broadcast Stations WPTD (Educ., Ch. 16), Dayton, Ohio, and WPTO (Educ., Ch. 14), Oxford, Ohio, were filed with the Commission claiming that Northern Ohio Cable ("Northern"), operator of a cable television system serving portions of Wayne County, Indiana, had declined to carry the stations, even though the cities of license of WPTD and WPTO are within 50 miles of the system's principal headend[1] and the stations are therefore "local" signals within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTD and WPTO also request that the Commission not only order Northern to carry the signals on the cable system, but also order that the system carry them on Channels 16 and 14, respectively, the channels on which they broadcast over-the-air. No opposition to these petitions have been filed.

2. WPTD and WPTO's petitions establish that they are entitled to carriage on the Wayne County system and they have requested carriage on their over-the-air broadcast channels, as they are permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in these matters, the complaints filed August 2, 1993, by Greater Dayton Public Television ARE GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Northern Ohio Cable IS ORDERED to commence carriage of WPTD and WPTO on cable channels 16 and 14 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that Northern has not provided its headend coordinates to WPTO and WPTD as required by Section 76.58(b) of the Rules, despite the stations' letters of May 28, 1993, requesting carriage. Since no oppositions to WPTO and WPTD's complaints have been filed, we accept petitioner's conclusion that Northern's headend for this system is located within 50 miles of both stations' cities of license.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3983-M
Public Television against	IN0870
MW-1 Cable Systems	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that MW-1 Cable Systems ("MW-1"), operator of a cable television system serving Laurel, Indiana, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend located at Laurel[1] and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order MW-1 to carry its signal, but also order the system to carry it on Channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. In a December 7, 1992 letter declining to carry WPTO, MW-1 contends that WPTO fails to consistently deliver a good quality signal to the system's headend. In support, it encloses the applicable section of the 1992 Cable Act which defines a good quality signal.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, MW-1 determined WPTO's signal strength to be below the requisite level for a UHF commercial station. However, the cable system failed to provide any engineering data to support its determination. Moreover, such a showing should also follow acceptable engineering practices. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[2]

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determination reached by MW-1 is insufficient to demonstrate that WPTO's signal is not of "good quality" at the cable system's headend.

7. WPTO's petition establishes that it is entitled to carriage on the Laurel cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed August 2, 1993, by Greater Dayton Public Television IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and MW-1 Cable Systems IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order* unless MW-1 submits the engineering data required herein to support its assertion of poor signal quality from WPTO

[1] We note that MW-1 has not provided its headend coordinates to WPTO as required by Section 76.58(b) of the Rules, despite WPTO's letter of December 2, 1992 requesting carriage and its follow-up letter of May 28, 1993 specifically requesting such information. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that MW-1's headend for this system is located at Laurel, Indiana.

[2] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

at MW-1's principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3963-M
State University against	MO0904
Friendship Cable of Missouri	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Friendship Cable of Missouri ("Friendship"), operator of a cable television system serving Gravois Mills, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend located at Gravois Mills,[1] and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Friendship to carry its signal, but also order the system to carry it on Channel 6, the channel on which it broadcasts over-the-air. An opposition to this petition was filed August 15, 1993, on behalf of Friendship.

2. In its opposition, Friendship states that its system engineer conducted a field survey analysis using a Wavetek Sam 1, calibrated March 11, 1993, connected to a low band Cadco antenna cut for channels 2 through 6, placed on a forty-foot tower with fifty feet of feed cable, and peaked on KMOS-TV's signal. This analysis determined that KMOS-TV's received signal was -4 dBmV (-53 dBm). Therefore, Friendship claims, KMOS-TV does not qualify for carriage on its system due to its poor signal quality.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, Friendship determined KMOS-TV's signal strength to be below the requisite level for a VHF commercial station. We find, however, that the cable system failed to following generally acceptable engineering practices in making its determination. Generally, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the data submitted by Friendship is insufficient to demonstrate that KMOS-TV's signal is not of "good quality" at the cable system's headend.

7. KMOS-TV's petition establishes that it is entitled to carriage on the Gravois Mills cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed July 8, 1993, by Central Missouri State University IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Friendship Cable of Missouri IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order* unless Friendship submits the engineering data required herein to support its assertion of poor signal quality from KMOS-TV at Friendship's principal headend. This

[1] We note that Friendship has not provided its headend coordinates to KMOS-TV as required by Section 76.58(b) of the Rules, despite KMOS-TV's letter of December 23, 1992 requesting carriage. Since Friendship's opposition to the complaint does not dispute the location of headend, we accept petitioner's conclusion that Friendship's headend for this system is located at Gravois Mills, Missouri.

action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3962-M
State University against	MO0824
Douglas Cable Communications	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Jamestown, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Jamestown and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the Jamestown system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Falcon Cable TV	CSR-3968-M MO0205

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On July 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Falcon Cable TV ("Falcon"), operator of a cable television system serving Harrisonville, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Harrisonville and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Falcon to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Harrisonville system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Falcon Cable TV IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] KMOS-TV states that it is its understanding that Falcon has conducted tests of KMOS-TV's signal strength at its headend. However, no results of these tests have been provided to KMOS-TV or been included in the instant petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3961-M
State University against	M00865
Douglas Cable Communications	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Kingsville, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Kingsville and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the Kingsville system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Falcon Cable TV — CSR-3967-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On July 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Falcon Cable TV ("Falcon"), operator of a cable television system serving Hermitage and Wheatland, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Hermitage/Wheatland and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Falcon to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Hermitage/Wheatland system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Falcon Cable TV IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart

[1] KMOS-TV states that it is its understanding that Falcon has conducted tests of KMOS-TV's signal strength at its headend. However, no results of these tests have been provided to KMOS-TV or been included in the instant petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3982-M
Public Television against	IN0924
MW-1 Cable Systems	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that MW-1 Cable Systems ("MW-1"), operator of a cable television system serving Metamora, Indiana, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend located at Metamora[1] and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order MW-1 to carry its signal, but also order the system to carry it on Channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. In a December 7, 1992 letter declining to carry WPTO, MW-1 contends that WPTO fails to consistently deliver a good quality signal to the system's headend. In support, it encloses the applicable section of the 1992 Cable Act which defines a good quality signal.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, MW-1 determined WPTO's signal strength to be below the requisite level for a UHF commercial station. However, the cable system failed to provide any engineering data to support its determination. Moreover, such a showing should also follow acceptable engineering practices. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[2]

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determination reached by MW-1 is insufficient to demonstrate that WPTO's signal is not of "good quality" at the cable system's headend.

7. WPTO's petition establishes that it is entitled to carriage on the Metamora cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed August 2, 1993, by Greater Dayton Public Television IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and MW-1 Cable Systems IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order* unless MW-1 submits the engineering data required herein to support its assertion of poor signal quality from WPTO

[1] We note that MW-1 has not provided its headend coordinates to WPTO as required by Section 76.58(b) of the Rules, despite WPTO's letter of December 2, 1992 requesting carriage and its follow-up letter of May 28, 1993 specifically requesting such information. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that MW-1's headend for this system is located at Metamora, Indiana.

[2] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

at MW-1's principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3985-M
Public Television against	IN0956
MW-1 Cable Systems	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 12, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that MW-1 Cable Systems ("MW-1"), operator of a cable television system serving Newpoint, Indiana, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend located at Newpoint[1] and the station is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order MW-1 to carry its signal, but also order the system to carry it on Channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. In a December 7, 1992 letter declining to carry WPTO, MW-1 contends that WPTO fails to consistently deliver a good quality signal to the system's headend. In support, it encloses the applicable section of the 1992 Cable Act which defines a good quality signal.

3. Section 615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(G)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

4. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

5. In this instance, MW-1 determined WPTO's signal strength to be below the requisite level for a UHF commercial station. However, the cable system failed to provide any engineering data to support its determination. Moreover, such a showing should also follow acceptable engineering practices. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[2]

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determination reached by MW-1 is insufficient to demonstrate that WPTO's signal is not of "good quality" at the cable system's headend.

7. WPTO's petition establishes that it is entitled to carriage on the Newpoint cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petition filed August 2, 1993, by Greater Dayton Public Television IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and MW-1 Cable Systems IS ORDERED to commence carriage of WPTO on cable channel 14 forty-five (45) days from the release date of this *Order* unless MW-1 submits the engineering data required herein to support its assertion of poor signal quality from WPTO

[1] We note that MW-1 has not provided its headend coordinates to WPTO as required by Section 76.58(b) of the Rules, despite WPTO's letter of December 2, 1992 requesting carriage and its follow-up letter of May 28, 1993 specifically requesting such information. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that MW-1's headend for this system is located at Newpoint, Indiana.

[2] For VHF-TV stations, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period, with measurements no more than 4 hours apart to establish reliable test results.

at MW-1's principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Cablevision — CSR-3893-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 13, 1994

By the Chief, Mass Media Bureau:

1. On July 1, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Channel 6), Sedalia, Missouri, was filed with the Commission claiming that Cablevision, operator of a cable television system serving Richmond and Henrietta, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend located at north latitude 39°15' 32" and west longitude 93°58'14" and it is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385. 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Cablevision to carry its signal, but also that it order the system to carry it on channel 6, the channel on which the station broadcasts over-the-air.

2. Although no formal opposition was filed, in a letter dated April 30, 1993, to KMOS-TV, Cablevision maintained that the station's signal strength at Cablevision's headend was not sufficient to entitle it to mandatory carriage on Cablevision's system serving Richmond and Henrietta.

3. Cablevision's letter dated April 30, 1993, to KMOS-TV concerning its signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. The 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, however, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[1] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[2] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys[3] should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of the calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Cablevision is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable system's principal headend.

4. Since Cablevision filed no further pleadings in the above proceeding, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and Cablevision IS ORDERED, to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Richmond and Henrietta Missouri, forty-five (45) days from the release date of this ORDER unless Cablevision submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Generally, if the test results for UHF stations are less than -51 dBm we believe that a least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

[2] *See* § 76.61 of the Commission's Rules.

[3] Field strength measurements for the determination of Grade B contours shall follow the procedures set forth in § 73.686 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELSO, INC.,
Complainant,

v. File No. E-93-097

AMERICAN TELEPHONE
& TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted December 17, 1993; Released: January 13, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On August 19, 1993, Telso, Inc. (Telso) filed the above-captioned formal complaint against the American Telephone and Telegraph Company (AT&T). Telso alleged in its complaint that AT&T had engaged in unjust and unreasonable practices with respect to charges for fraudulent calls placed from or to its privately owned payphones.

2. The parties filed a joint motion to dismiss on December 1, 1993. In support of their motion, the parties stated that they had resolved all issues in dispute and requested that the proceeding be dismissed without prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed on December 1, 1993 IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 30, 1993

Released: January 13, 1994

93090037-MK

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ana G. Mendez Educational Foundation
Licensee, Noncommercial Television Station WMTJ-TV
P.O. Box 21345
Rio Piedras, Puerto Rico 00928
Att: Jose F. Mendez, President

Dear Mr. Mendez:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE, pursuant to Section 503(b) of the Communications Act of 1934, as amended.

By letter of September 20, 1993, we inquired into possible violations of Section 399B of the Communications Act of 1934, as amended, and Section 73.621(e) of the Commission's Rules. These provisions prohibit noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for renumeration. Although contributors of funds may receive on-air acknowledgements, the Commission has stated that such acknowledgements may be made for identification purposes only and should not promote the contributors' products. Our letter cited complaints that noncommercial television station WMTJ-TV, Fajardo, Puerto Rico, had, in connection with coverage of the U. S. Open Tennis Tournament, broadcast announcements that were promotional in nature, in that they went beyond simple identification to picture the actual use and enjoyment of products and services.

Your reply of November 3, 1993, concedes broadcast of commercial messages for five companies during your 1993 U.S. Open coverage: Banco Santander, Heineken Beer, Tinactin, Suiza Fruit, and Rivera Jewelers. These broadcasts were aired on seven days during the period of August 30 through September 12, 1993, you state. While the station has a general policy that its donor announcements are to comply with Commission requirements, you admit that persons responsible for compliance with this policy did not exercise appropriate care here. Thus you state that your Development Director had recently joined WMTJ-TV after working in commercial media positions and did not fully understand requirements for noncommercial educational stations. And, you continue, senior management personnel, including the stations's General Manager, were substantially involved with other projects at the time.

By way of mitigation, you urge that you have adopted a new, written underwriting policy and have engaged counsel to inform and advise management and development staff. You assert further that your broadcasts were made in good faith and represent an isolated exception to your otherwise unblemished broadcast record. Finally, you suggest that any financial penalty imposed upon you will impede your ability to serve the educational and informational needs of the public. We note, however, that the violations at issue were clear, repeated, and attributable ultimately to a lack of proper attention on the part of station management. We find that sanctions are appropriate and justified under these circumstances.

Accordingly, pursuant to Section 503(b) of the Communications Act, Ana G. Mendez Educational Foundation is hereby advised of its apparent liability for a forfeiture of five thousand dollars ($5,000) for its apparent violation of Section 399B of the Communications Act of 1934, as amended, and Section 73.621(e) of the Commissions's Rules. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. Section 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Radio WBAW, Inc.
Licensee, Station WBAW-AM
Barnwell, South Carolina
For a Forfeiture

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1993; Released: January 13, 1994

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 8 FCC Rcd 436 (1993), imposing a forfeiture of $5,000 upon Radio WBAW, Inc, licensee of Station WBAW-AM, Barnwell, South Carolina, for violation of Section 73.1206 of the Commission's Rules, and (2) Radio WBAW's response to the NAL filed February 10, 1993. Section 73.1206 in pertinent part requires that licensees inform parties to a telephone conversation of the licensee's intention to broadcast the conversation.

2. In imposing a forfeiture upon Radio WBAW, our NAL cited a complaint that Station WBAW had recorded a conversation with Mr. Andy Sanders and broadcast it several times, without informing Mr. Sanders prior to the recording of its intended use. We noted that Radio WBAW, in response to our inquiry, had expressed its "strong belief" that Mr. Sanders was aware that his comments would be used in a broadcast news story. We pointed out, however, that the licensee had provided no evidence in support of its claim.

3. In response to the NAL, Radio WBAW has submitted the affidavit of Sallie Terry Hein, news director of Station WBAW-AM at the time of the incident, who states that she informed Mr. Sanders that she was recording his comments for subsequent broadcast use. Ms. Hein continues that Mr. Sanders agreed to this use. We find ourselves, in light of Ms. Hein's affidavit, with conflicting accounts as to whether appropriate information was given. We cannot, as a consequence, conclude that a violation of our rules occurred. We will accordingly rescind the forfeiture imposed upon Radio WBAW, Inc.

4. Accordingly, the response of Radio WBAW, Inc., IS GRANTED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Apollo Radio of Salt Lake City, Inc.
Licensee, Station KKAT-FM
Salt Lake City, Utah

For a Forfeiture

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1993; Released: January 13, 1994

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 8 FCC Rcd 6735 (1993), assessing a forfeiture of $5,000 against Apollo Radio of Salt Lake City, Inc., ("Apollo") for violation of Section 73.1206 of the Commission's Rules, and (2) Apollo's response filed October 8, 1993.

2. Section 73.1206 in pertinent part requires that before broadcasting a telephone conversation live, or recording it for broadcast, a licensee inform any party to the call of the licensee's intention either to record the conversation for broadcast or to broadcast the call simultaneously with its occurrence. Our NAL reflected our finding, confirmed by Apollo itself, that Station KKAT disc jockeys had, on or about July 24, 1992, broadcast a telephone conversation with Ms. Kathy Worthington without first informing Ms. Worthington of their intention to do so.

3. In response to the NAL, Apollo asserts that its conduct resulted from misunderstanding rather than bad faith, that its disc jockeys apologized to the caller, and that it took immediate steps to revise its procedures. As we stated in our NAL with respect to these same assertions, however, none of these considerations alters the fact that Apollo did, indeed, violate our rules. At the same time, though, we are persuaded by the responsive pleading that the forfeiture amount should be adjusted downward to reflect Apollo's history of compliance with Commission Rules. Hence, we will reduce the forfeiture to $3,500 on this basis.

4. Accordingly, the response of Apollo Radio of Salt Lake City, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. IT IS ORDERED, that Apollo Radio of Salt Lake City, Inc., licensee of Station KKAT-FM, Salt Lake City, Utah, FORFEIT to the United States three thousand five hundred dollars ($3,500) for its violation of Section 73.1206 of the Commission's Rules. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John T. Davidson NAL/Acct. No: 215FE0210
Marysville, Washington

ORDER

Adopted: January 3, 1994; Released: January 13, 1994

1. Mr. John T. Davidson has requested review of a forfeiture action. The Forfeiture Order is dated October 2. 1992. The forfeiture is mitigated to $100.

2. Mr. Davidson was charged with operation of an unlicensed maritime mobile radio station. See 47 U.S.C. §301.

3. Mr. Davidson makes no arguments. He presents nothing which was not before the Engineer-in-Charge. The Commission has reconsidered the usual forfeiture for the violation. Considering that Mr. Davidson is an individual and has no history of noncompliance it is consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993), that the forfeiture amount be reduced to $100.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that John T. Davidson pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0210, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tony L. Bozanich NAL/Acct. No: 215FE0004
Bellevue, Washington

ORDER

Adopted: January 3, 1994; Released: January 13, 1994

1. Mr. Tony L. Bozanich has requested review of a Forfeiture Order dated July 6, 1992. The forfeiture is mitigated to $100.

2. Mr. Bozanich was charged with operation of an unlicensed maritime mobile radio station. See 47 U.S.C. §301.

3. Mr. Bozanich makes no arguments. He has submitted his tax return for 1991. The Commission has reconsidered the usual forfeiture for the violation. Considering that Mr. Bozanich is an individual with limited financial resources and has no history of noncompliance it is consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures*, 8 FCC Rcd 6215 (1993), that the forfeiture amount be reduced to $100.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Tony L. Bozanich pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0004, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

J. HOBART WILSON File Nos. 16159-CM-P-83
12 16166-CM-P-83

Notice of Apparent Liability
for Forfeiture regarding applications
to construct and operate Multichannel
Multipoint Distribution Service
stations on the F-group channels at
Idaho Falls, Idaho and Lansing, Michigan

ORDER ON FORFEITURE

Adopted: January 5, 1994; Released: January 13, 1994

By the Chief, Domestic Facilities Division:

1. On August 3, 1993, a Notice of Apparent Liability for Forfeiture was issued in the amount of $3000 against J. Hobart Wilson (Wilson) for each of the above-referenced applications at Idaho Falls, Idaho and Lansing, Michigan for failure to provide necessary and accurate information in connection with his preference certification forms. Wilson, through his attorney, requests that the proposed forfeiture be set aside or substantially reduced.

I. BACKGROUND

2. On January 15, 1993, the Commission released Lottery Notice, Report No. MMDSL-47, which listed the MMDS applications to be included in the February 26, 1993 lotteries. This list also identified the preference group for each MMDS application. A "B" preference was listed in the January 15, 1993 Lottery Notice for Wilson's applications at Idaho Falls and Lansing, indicating that Wilson had no interest in any media of mass communications. On August 3, 1993, the Domestic Facilities Division (Division), responding to the claims raised in a Petition to Deny filed by Multi-Micro, Inc., issued a Notice of Apparent Liability (NAL) for Forfeiture. The Division found that Wilson violated Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's rules, in that he failed to file correct certification of preference forms prior to the lottery.[1]

II. CONTENTIONS

3. In its response to the NAL, Wilson argues that the monetary forfeiture penalty directed by the NAL is unduly harsh, and should be set aside or substantially reduced. Wilson emphasizes that he did not willfully fail to comply with the Commission's rules. Instead, he states that his failure to provide the Commission with the correct preference information was an "inadvertent oversight" and not deliberate. Further, Wilson maintains that when initially filed, the preference forms were accurate.

III. DISCUSSION

4. Upon review, we find that Wilson has not justified his request to set aside or to mitigate the monetary forfeiture penalty. In fact, the evidence submitted by Wilson demonstrates that he indeed failed to comply with Commission rules. Wilson admits that he did not carefully monitor the status of the above-referenced applications. Further, he admits that he failed to advise the Commission, after being granted MDS licenses in Albany and Milwaukee, that his "B" preference was no longer accurate. Section 1.65 of the Commission Rules specifically states that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application.[2] Moreover, Wilson's request for rescission fails because, as we have previously noted

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question...."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983).

5. Further, while Wilson alternatively requests reduction of the forfeiture, mitigating factors were already properly taken into account by the Division in setting the amount for forfeiture in the NAL, and Wilson has presented no additional justification here to support a further reduction.[3] Consequently, we uphold the $3,000.00 forfeiture for each of the above-referenced applications.

IV. ORDERING PARAGRAPHS

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that J. Hobart Wilson FORFEIT to the United states the sum of Three Thousand Dollars ($3,000.00) for each of the above-referenced applications for violation of Sections 1.65, 1.1622, 1.824(b) and 21.13(a)(5) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within

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[1] A review of Commission records revealed that Wilson had more mass media holdings than represented in his previously-filed preference certification forms. Specifically, the "B" listed for Wilson was incorrect because our records showed that Wilson holds authorizations for two MDS facilities.

[2] For purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

[3] For example, Wilson failed to include mitigating factors such as statements regarding history of overall compliance, inability to pay, or good faith. Thus, he did not affirmatively demonstrate that a further reduction is warranted.

thirty (30) days of the release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

7. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to J. Hobart Wilson, Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 13, 1994

CARRIERS AND NECA FILE COST ALLOCATION MANUAL (CAM) REVISIONS CITIZENS UTILITIES FILES INITIAL CAM

The American Telephone and Telegraph Company, the National Exchange Carrier Association (NECA) and several local exchange carriers filed revisions to their CAM for the separation of regulated and nonregulated costs for the quarter ended December 31, 1993. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

American Telephone and Telegraph Company	AAD 94-1
Ameritech Operating Companies	AAD 94-2
Bell Atlantic	AAD 94-3
BellSouth Corporation	AAD 94-4
Cincinnati Bell Telephone	AAD 94-5
GTE	AAD 94-7
Lincoln Telephone	AAD 94-8
Nevada Bell	AAD 94-9
NYNEX Telephone Companies	AAD 94-10
Pacific Bell	AAD 94-11
Puerto Rico Telephone Company	AAD 94-12
Rochester Telephone	AAD 94-13
Southern New England Telephone Company	AAD 94-14
Southwestern Bell	AAD 94-15
United & Central	AAD 94-16
U S West, Inc.	AAD 94-17
NECA	AAD 94-18

On December 31, 1993, Citizens Utilities, newly subject to CAM filing requirements, submitted its initial CAM. The AAD number assigned to this filing is listed below.

Citizens Utilities	AAD 94-6

Parties may file comments on the proposed revisions to the CAMs nd on Citizens Utilities' initial CAM no later than February 11, 1994. Replies should be filed by February 26, 1994. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W. Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from ITS. For further information contact Alicia Dunnigan at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vortex Computers NAL/Acct. No.: 315LA0034
Newtown, Pennsylvania

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Vortex Computers (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's January 26, 1993, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 302(b). As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $5,600.

II. BACKGROUND

3. On November 19, 1992, an FCC inspector from the Commission's Los Angeles Office visited the Vortex/Arima booth at the Fall Comdex Computer Trade Show in Las Vegas, Nevada. He observed that Vortex was displaying the Vortex Palmtop 6MHz computer, and the Vortex Spectrum TFT 486 SLC 33 MHz computer. Both of these are personal computers that are classified as Class B digital devices and had to be certified pursuant to Section 15.101 of the Rules, 47 C.F.R. § 15.101.

4. On December 7, 1992, pursuant to the forfeiture provisions of Section 503(b) of the Act, 47 U.S.C. § 503(b), the Los Angeles Office issued a $7,000 Notice of Apparent Liability (NAL) to Petitioner for violating Section 302(b) of the Act, 47 U.S.C. § 302(b). On January 21, 1993, Petitioner responded to the NAL. After review of the response, The Commission's Los Angeles Office issued a Forfeiture Order on January 26, 1993, for $7,000.

III. DISCUSSION

5. Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules prohibit the marketing of equipment capable of causing radio interference prior to grant of an equipment authorization by the Commission. The devices in question were displayed at a trade show. Promoting or displaying a device or product in a trade show is considered to be the active marketing of that device or product. Even though on-the-spot orders might not be solicited or accepted, the device or product is displayed to potential distributors, retailers, or end-users. Displaying equipment without the conspicuous notice specified in Section 2.803 of the Commission's Rules[1] is considered to be marketing of that equipment. No notice accompanied the displayed equipment. Because the equipment had no FCC labels affixed indicating that the equipment was authorized or a conspicuous notice that the equipment was not authorized and not for sale, the Los Angeles Office issued the NAL for selling unauthorized equipment.

6. In the Petition for Reconsideration, Petitioner claims that it applied for an equipment authorization for the 486SLC33 TFT machine prior to the show, but authorization was not granted until December 16, 1992. Therefore, display of the equipment (with or without labels) prior to the date of grant of the equipment authorization without the disclaimer specified in Section 2.803 violated that rule. No such disclaimer was displayed.

7. Vortex Computers contends that it is the distributor or retailer of computers manufactured by Arima Computer Company. Regardless of whether it is the distributor or retailer, Vortex, as the equipment marketer, is responsible for complying with the Commission's marketing rules. In addition, the particular units that lacked labels bore the Vortex name, not the Arima name.

8. Petitioner has failed to provide justification for cancellation of the monetary forfeiture penalty for displaying non-approved equipment in a marketing environment. However, considering petitioner's history of compliance, a reduction in the amount of the penalty is appropriate, and the forfeiture amount will be adjusted accordingly.

IV. CONCLUSION

9. For the reasons cited above, we reduce the finding of liability for monetary forfeiture to $5,600. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

10. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that Vortex Computers FORFEIT to the United States the sum of five thousand six hundred dollars ($5,600) for the willful violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules.

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[1] Section 2.803 states in part: "... advertising or display of a device, which has not been granted type approval, type acceptance, certification or notification, will not be deemed to be an offer for sale if such advertising contains, and the display is accompanied by, conspicuous notice worded as follows: *This device has not been approved by the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained...*"

11. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that Vortex Computers shall make such payment within 30 days of receipt of this ORDER.[2] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. 315LA0034, and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to Vortex Computers. 2790 Windybush Road, Newtown, Pennsylvania 18940.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[2] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
January 3, 1994

Released: January 14, 1994

Frank M. Franciscovich
Attorney at Law
640 First National Bank Bldg.
Aberdeen, WA 98520

Dear Mr. Franciscovich:

This is in response to your petition for reconsideration in the matter of Bay Fish, Inc. of Westport, Washington, NAL/Acct. No. 215FE0187. The petition was dated November 13, 1992.

In the maritime mobile service, ship stations are authorized to transmit on any frequency that is listed in Part 80 of the Commission's Rules that falls within the frequency band authorized by the station's license. On the other hand, coast stations (stations on land that communicate with ship stations) are authorized to use *only* the frequencies listed on their station licenses. As indicated in other correspondence and confirmed by data in the Commission's licensing records, Bay Fish's station, KBP363, is authorized to transmit *only* on VHF marine channels 10 and 16.

Most modern VHF marine radios are multi-channel units that can, by turning a frequency control dial or pressing corresponding buttons on a key pad, be set to transmit on any or almost any of the marine channels authorized for use aboard ships. Since there are no claims to the contrary in prior correspondence, it is assumed that the radio used at KBP363 is of this type. Therefore, it would have been easy for anyone who was familiar with the VHF marine radio channels to walk up to the radio and place it on an unauthorized frequency.

Your client has previously admitted that the radio was located in a public or semi-public area where it was accessible to the captains and crew members of boats that were unloading cargo. It is long-standing Commission policy that its licensees are responsible for controlling use of and access to transmitting equipment licensed to them. To install a radio transmitter in a location that is accessible to the public is an invitation for trouble. Additionally, to leave a transmitter in a temporarily unguarded area not under the direct control of the licensee or one of his employees is an additional invitation for trouble. The station was identified as "Bay Fish" in lieu of its assigned call sign, KBP363. There is no other ship or coast station in the monitored area bearing the name Bay Fish. Nobody was aware that Commission staff was monitoring in the area at the time. Therefore, nobody would have had an incentive to identify themselves falsely as "Bay Fish" in an attempt to "get your client into trouble".

The transmission was considered to have been willful because it appeared that the operator made a conscious attempt to transmit when he did. Section 312(f)(1) of the Communications Act defines a willful violation as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate and provision of this Act..." 47 U.S.C. § 312(f)(1). *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). Willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question such as using a radio transmitter, as opposed to being accidental activation caused by a defective transmitter on-off switch or by a spurious emission. The operator clearly intended to transmit when he did so and his purpose in transmitting was to communicate. This makes the violation willful within the definition of that term.

Your interpretation of Section 503(b)(3)(A) of the Communications Act, 47 U.S.C. §503(b)(3)(A), is incorrect. The Commission has the discretion to determine whether or not to grant an opportunity for a hearing prior to issuance of a forfeiture notice. It is the Commission's current policy that such hearing requests are not normally granted. Therefore, there is nothing in your petition that would justify cancellation of the forfeiture and it will not be cancelled.

The Commission has recently reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on the revised standards and the fact that we have no record of prior violations by your client, we are reducing the forfeiture amount to $400.

Your client is ordered to pay $400. This amount is due and payable immediately. The forfeiture should be paid by check or money order made payable to the Federal Communications Commission and sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215FE0187 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Computer Resolutions NAL/Acct. No.: 215LA0044
Bellflower, California

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Computer Resolutions (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's September 9, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b) (the Act) and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $1,400.

II. BACKGROUND

3. Our records show that on March 12, 1992, an FCC inspector from the Los Angeles Office visited Computer Resolutions' place of business at 16900 S. Lakewood Blvd., #308, Bellflower, California. The inspector checked eight personal computers that were on the display rack in the salesroom of the store. All except two bore identification labels indicating that they were FCC certified. The two that did not bear certification labels also did not bear model numbers but did bear serial numbers of CR01139201 and CR02119201. All appeared to be brand new. There was no evidence that they had been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. § 15.101. There was no conspicuous notice as required by Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, indicating that they were unapproved prototype models not for sale.

4. On April 1, 1992, the Los Angeles Office mailed an Official Notice of Violation to Petitioner. The Official Notice of Violation required a written response within ten (10) days. No response was received.

5. On August 3, 1992, pursuant to authority delegated under Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 0.314 of the Commission's Rules, 47 C.F.R. § 0.314, the Los Angeles Office issued a $7,000 Notice of Apparent Liability (NAL) to Petitioner for violating Section 302(b) of the Act, 47 U.S.C. § 302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. The NAL was issued for displaying only one uncertified device although two were actually found on display since it was unclear whether the two units were identical units or not.

6. In an undated response, Petitioner responded to the NAL. It stated that the computer in question was not for sale to customers and that it was used only to demonstrate to students how to assemble and disassemble a personal computer. It requested cancellation of the NAL on that basis. After review of the response, the Commission's Los Angeles Office issued a Forfeiture Order on September 9, 1992, for $7,000.

III. DISCUSSION

7. Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules prohibit the marketing of equipment capable of causing radio interference prior to grant of an equipment authorization by the Commission. No label accompanied the displayed equipment.

8. In the petition for reconsideration, Petitioner claims that the forfeiture was issued in error because:

a) self assembled computers are not required to be certified, and

b) the unit in question was not for sale.

9. We are unpersuaded by Petitioner's claims. The computer in question was found on the display rack in the salesroom of Petitioner's store. Any computer displayed in the salesroom of a store is presumed to be for sale unless the notification specified in Section 2.803 of the Commission's Rules is prominently displayed. Therefore, the uncertified computer is presumed to have been for sale.

10. The computer in question was assembled by the store, not by the ultimate end-user. Certification rules apply to all personal computers that are offered for sale or lease irrespective of where they are assembled. It is immaterial whether they are assembled in a large computer factory or in a small computer repair shop.

11. Petitioner claims that having the uncertified computer in its facility did not violate the Commission's rules. We concur only to the extent that there would have been no violation if the equipment in question had not been offered for sale or lease in any way, including advertisements or displays. However, this was not the case. The uncertified computer was displayed prominently in Petitioner's salesroom along with other certified computers for sale and there was no prominent notice as required by Section 2.803 of the Commission's Rules to indicate that it was a prototype, demonstration, or instructional unit that was not for sale.

12. Petitioner claims that it has no prior history of violations and that this merits a reduction in the amount of the forfeiture. We concur and are reducing the amount partly on that basis.

13. Petitioner claims that having to pay a $7,000 forfeiture would be extremely burdensome for such a small business enterprise. To support this claim, it has submitted copies of its federal income tax for the past three years. We concur and are reducing the amount partly on that basis.

IV. CONCLUSION

14. For the reasons cited above, we reduce the finding of liability for monetary forfeiture to $1,400. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

15. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that Computer Resolutions FORFEIT to the United States the sum of one thousand four hundred dollars $1,400 for the willful violation of Section 302(b) of the Communication Act and Section 2.803 of the Commission's Rules.

16. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that Computer Resolutions shall make such payment within thirty (30) days after receipt of this ORDER.[1] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. 215LA0044, and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

17. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to Computer Resolutions, 16900 S. Lakewood Blvd. #308, Bellflower, California 90706. One copy will also be sent to Petitioner's attorney.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AmTech Organization, Inc. NAL/Acct. No.: 215LA0013
Stoughton, Massachusetts

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

By the Chief, Field Operations Bureau:

1. The Bureau has before it a Petition to cancel a July 21, 1992, Notice of Forfeiture issued to AmTech Organization, Inc., (AmTech) for violating Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b). As explained below, we are cancelling the monetary forfeiture penalty.

2. AmTech maintains that it has filed for bankruptcy protection pursuant to Chapter 7 of the Bankruptcy Code and is unable to pay the forfeiture. In support, AmTech has provided pleadings from the court indicating that AmTech is under the protection of the bankruptcy court.

3. Based on the foregoing, IT IS ORDERED that the Notice of Forfeiture is hereby cancelled.

4. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to AmTech Organization, Inc., 300 Tosca Drive, Stoughton, MA 02072 with an additional copy to its attorney.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
Janauary 3, 1994

Released: January 14, 1994

Ira W. Hansley
2725 19th Avenue North
Texas City TX 77590

In reply, refer to:
215KI0011

Dear Mr. Hansley:

This is in response to your September 17, 1992, letter requesting higher level review of forfeiture No. 215KI0011 that was issued to Billie Jean Hansley for operation of an unlicensed radio aboard the vessel ELIZABETH R, official number 600860.

In accordance with your request, we have carefully reviewed the matter. We find no new facts that were not previously considered in determining the forfeiture amount. However, the Commission has recently reviewed its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeiiures,* 8 FCC Rcd 6215 (1993). Based on the fact that we have no prior record of unlicensed operation on your part, we are reducing the forfeiture amount to $100. You are ordered, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), to pay $100. The forfeiture should be paid by check or money order sent to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

To ensure proper credit, please place the number NAL/Acct. No. 215KI0011 on the remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Field Operations Bureau
Washington, D.C. 20554

LETTER
January 3, 1994

Released: January 14, 1994

Brix Maritime Co.
Attn: Edward S. Beall,
President
P.O. Box 83018
Portland, OR 97283-0018

In reply, refer to:
NAL Acct. No. 215FE0129

Dear Mr. Beall:

This is in response to your August 17, 1993, letter concerning the forfeiture issued for operating an unlicensed private coast station in the maritime mobile radio service. Although not specifically identified as such, your letter is being considered as a request for higher level review.

Normally, failure to file a timely license renewal application would be considered a relatively minor violation. However, neglecting to file for over three years removes it from the minor category. Furthermore, the fact that the station is now properly licensed cannot be used to mitigate penalties for prior unlicensed operation.

The Commission has recently revised its forfeiture policy relating to this type of violation. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Based on this new policy and the fact that your unlicensed operation was not previously intercepted, we are reducing the forfeiture amount to four hundred dollars ($400). You are ORDERED to pay $400. This amount must be paid within 30 days of the date of receipt of this letter. Payment should be made by check or money order payable to the Federal Communications Commission and mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482.

To ensure proper credit, please place the Number NAL/Acct. No. 215FE0129 on your remittance.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Computer Data, Inc. NAL/Acct. No.: 215ST0018
Billings, Montana

Liability for Monetary Forfeiture

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a petition for reconsideration filed by Computer Data, Inc., (Petitioner), requesting reconsideration of the Seattle Office's August 10, 1992, Forfeiture Order finding Petitioner liable for a monetary forfeiture in the amount of $14,000 for violating Section 302(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $11,200.

II. BACKGROUND

3. Computer Data, Inc. is a retailer of personal computers. Personal computers are defined in Section 15.1(i) as Class B digital devices. 47 C.F.R. § 15.1(i). Section 15.101(a) of the Commission's Rules specifies that an equipment authorization in the form of certification is required for all Class B digital devices prior to initiation of marketing. 47 C.F.R. §§ 2.803 and 15.101(a).

4. On March 11, 1992, an FCC inspector from the Commission's Seattle Office visited a store of Computer Data, Inc. He observed a Model 386-25DX and a Model 386-40DX personal computer being offered for sale. Neither of these personal computers bore labels to indicate that they had been FCC certified. This is required under Section 2.925(a) of the Commission's Rules. 47 C.F.R. § 2.925(a).

5. On July 23, 1992, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), the Seattle Office issued a $14,000 Notice of Apparent Liability (NAL) to Computer Data, Inc. for violating Section 302(b) of the Act, 47 U.S.C.§ 302(b), by marketing unauthorized equipment. Petitioner filed a response dated Autust 3, 1992, stating that the referenced computers are marketed for Class A use, and, therefore, certification is not appropriate. Based on this response, the Seattle Office issued a Notice of Forfeiture for $14,000 on August 10, 1992.

III. DISCUSSION

6. Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules prohibit the marketing of personal computers without an equipment authorization. All personal computers for which an equipment authorization is issued by the Commission must bear a label attesting to this fact before they are marketed. Equipment authorization and labelling requirements apply to personal computers regardless of the purposes for which the computers are sold.

7. In the petition for reconsideration, Petitioner states that it should not be subject to a monetary forfeiture penalty because the computers were marketed for Class A use. Under Sections 15.3(i) and 15.101(a) of the Commission's Rules, personal computers are, by definition, Class B digital devices, and are subject to the Commission's equipment authorization and labelling rules irrespective of the purposes for which they are marketed.

9. Petitioner also asserts, but offers no specific argument, that the Seattle Office's decision is "arbitrarily capricious and is in violation of [Petitioner's] rights" and "lacks any factual basis, represents an overreaching by a federal agency, and further constitutes a taking of private property and rights without due process of law". These arguments are unpersuasive. Petitioner was provided with notice regarding the legal and factual bases for the violation and proposed forfeiture in accord with the forfeiture provisions of the Act, *see* 47 U.S.C. § 503, and has been afforded several opportunities to respond and present exculpatory arguments and evidence. The reference to a notice of opportunity for hearing mentioned in Section 1.80(g) of the Commission's Rules is a discretionary provision available to the Commission that is not normally utilized when only monetary forfeiture matters are involved.

10. We note, however, that Petitioner has a record of prior compliance with the Commission's rules. Based on this history of prior compliance, we are reducing the forfeiture amount accordingly.

IV. CONCLUSION

11. For the reasons cited above, we reduce the finding of liability for monetary forfeiture to the amount of $11,200. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

12. IT IS ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.106 of the FCC's Rules, 47 C.F.R. § 1.106, that the relief sought in the petition for reconsideration is DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Computer Data, Inc. shall FORFEIT to the United States the sum of eleven thousand two hundred dollars ($11,200) for the willful violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules.

14. IT IS FURTHER ORDERED that Computer Data, Inc. shall submit payment of this $11,200 monetary forfeiture within 30 days of receipt of this Order.[1] Payment should be made by check or money order payable to the Federal Communications Commission. Please place NAL number 215ST0018 on the remittance and send it to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

15. IT IS FURTHER ORDERED that one copy of this Order be sent by Certified Mail, Return Receipt Requested, to Computer Data, Inc., 2020 Grand Avenue, Billings, Montana 59102, and one copy sent to Petitioner's counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John Demetro NAL/Acct. No: 315PA0003
Washington, D.C.

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

1. On December 31, 1992, John Demetro was issued a Notice of Apparent Liability for Monetary Forfeiture for $2,000 for willful violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. § 301, as a result of operation of an unlicensed radio station on Marine channel 16.

2. On January 21, 1993, the FCC received a letter from Mr. Demetro's lawyer attesting to Mr. Demetro's honesty and integrity. The letter also states that Mr. Demetro was unaware that a license was required to operate the radio on board his vessel, Dutchess. The letter further provided hospital bills for Mr. Demetro's wife's treatments.

3. A Forfeiture Notice was issued on February 24, 1992, reducing the forfeiture to $1,000.

4. On March 22, 1993, Mr. Demetro requested review of the case. No new information was provided.

5. Mr. Demetro admits that the station was not licensed and that his grandson used the radio, including use of profanity and transmission of a false distress call which was responded to by the Coast Guard. Mr. Demetro was not cited for the profanity or false distress, but only for the unlicensed operation. The Commission has reconsidered the appropriate amount of forfeiture for unlicensed operation of this type. We are, therefore, reducing the forfeiture to $100. This is consistent with the *1993 Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993).*

6. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that John Demetro pay a forfeiture of $100 within 30 days of the release of this Order.

7. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 315PA0003, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Seaview Boatyard, Inc. NAL/Acct. No: 215ST0027
Seattle, Florida

ORDER

Adopted: January 3, 1994; Released: January 14, 1994

1. Seaview Boatyard, Inc., (Seaview) has requested review of a forfeiture action. The Forfeiture Order was released August 18, 1992. The forfeiture is mitigated to $5,500.

2. Seaview was charged with operation of a private land mobile radio station without an authorization in willful violation of 47 U.S.C. §301.

3. There is nothing unusual about this case other than the fact that Seaview purchased the transmitters used and unpackaged. It did not receive them, therefore, with any original packing documentation which might have included notification for the requirement for an FCC license. Seaview is responsible, nevertheless, for being aware of the radio regulations and properly licensing and conducting its radio operations. Considering that this is a first offense, and consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures,* 8 FCC Rcd 6215 (1993) the forfeiture amount is reduced to $5,500.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Seaview Boatyard, Inc. pay a forfeiture of $5,500 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215ST0027, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-298

In the Matter of

Amendment of the Commission's
Rules to Establish a Single AM
Radio Stereophonic Transmitting
Equipment Standard

ERRATUM

Released: January 14, 1994

By the Chief Engineer:

1. On November 23, 1993, the Commission released a *Report and Order,* FCC 93-485, 58 FR 66300 (December 20, 1993), amending Part 73 of the Rules to adopt an AM radio stereophonic transmitting equipment standard. This *Erratum* corrects the amended rules described in Appendix B to the *Report and Order.*

2. Appendix B of the *Report and Order* is corrected by deleting the last sentence of amended rule §73.128(a). §73.128(a) correctly reads as follows:

> (a) An AM broadcast station may, without specific authority from the FCC, transmit stereophonic programs upon installation of type accepted stereophonic transmitting equipment and the necessary measuring equipment to determine that the stereophonic transmissions conform to the modulation characteristics specified in paragraphs (b) and (c) of this section. Stations transmitting stereophonic programs prior to *(insert date 90 days after publication in Federal Register)* may continue to do so until *(insert date one year plus 90 days after publication in Federal Register)* as long as they continue to comply with the rules in effect prior to *(insert date 90 days after publication in Federal Register).*

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-3984-M
Public Television against	IN0630
Sunman Cablevision Company	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: January 14, 1994

By the Chief, Mass Media Bureau:

1. On August 2, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that Sunman Cablevision Company ("Sunman"), operator of a cable television system serving Sunman, Indiana, had declined to carry the station, even though WPTO is within fifty miles of the system's principal headend at Sunman[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order Sunman to carry its signal on the cable system, but also order that the system carry it on Channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. WPTO's petition establishes that it is entitled to carriage on the Sunman system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed August 2, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Sunman Cablevision Company IS ORDERED to commence carriage of WPTO on cable channel 14 forty- five (45) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We note that Sunman Cablevision has not provided its headend coordinates to WPTO as required by Section 867.58(b) of the Rules, despite WPTO's letter of May 28, 1993 requesting carriage. Since no opposition to WPTO's complaint has been filed, we accept petitioner's conclusion that Sunman Cablevision's headend for this system is located at Sunman, Indiana.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revisions to FCC Form 329,
Cable Programming Service Rate
Complaint Form

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ORDER

Adopted: December 13, 1993; Released: January 14, 1994

By the Chief, Mass Media Bureau:

1. By this *Order*, the Bureau adopts on its own motion a revised FCC Form 329, Cable Programming Service Rate Complaint Form.[1] Over five thousand individuals and franchising authorities have filed complaints against cable systems on this form since September 1, 1993. Our preliminary analysis of these complaints indicates that the majority of persons completing the form are able to provide a complete response, thereby triggering the rate regulation process at the federal level. We have also discovered, however, that a number of complainants are responding to questions on the form either incompletely or incorrectly. In order to make it easier for consumers and local government officials to participate fully in the rate regulation process, as Congress envisioned when passing the 1992 Cable Act,[2] we are today adopting a modified version of FCC Form 329.

2. Our revised Form 329 solicits all information required to file a rate complaint pursuant to Section 76.951 of the Commission's Rules, but offers simplified instructions and more clearly worded questions. We believe that this revision will offer consumers and franchising authorities more guidance in filing a cable programming service rate complaint than does the current version of the form. As a result, we anticipate that fewer incorrect or incomplete complaints will be submitted.

3. The new version of FCC Form 329 will be released as soon as possible. We will continue to accept the current version of FCC Form 329 until our supply of that version is exhausted.

4. This action is taken pursuant to authority delegated to the Mass Media Bureau at 47 C.F.R. § 0.61(n)(1).

5. For further information concerning this *Order*, contact Michael Ruger, Cable Services Division, (202) 416-0856.

---

[1] The current version of FCC Form 329 was adopted in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (Report and Order)*, 8 FCC Rcd 5631 (1993), *appeal pending*.
[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

WNNE-TV, INC. CSR-3898-A

For Modification of Station
WNNE-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993 **Released: January 18, 1994**

By the Chief, Mass Media Bureau:

INTRODUCTION

1. WNNE-TV, Inc. ["WNNE-TV"], licensee of Station WNNE-TV (NBC, Channel 31), Hartford, Vermont, has filed the captioned petition for special relief seeking to include the communities of Alexandria, Bridgewater, Bristol, and Hebron, New Hampshire within WNNE-TV's Burlington, Vermont-Plattsburgh, New York "area of dominant influence" for purposes of the cable television mandatory broadcast signal carriage rules. WNNE-TV's petition is opposed by WMTW Holdings Corp. ["WMTW-TV"], licensee of Station WMTW-TV (ABC, Channel 8), Poland Spring, Maine, and WNNE-TV has replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in *MM Docket No. 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

Id. at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.,* when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities in question--Alexandria, Bridgewater, Bristol, and Hebron, New Hampshire--are all located within Grafton County, New Hampshire, which is part of the Portland-Poland Spring, Maine ADI, and which is adjacent to WNNE-TV's Burlington, Vermont-Plattsburgh, New York ADI. The communities are situated in the southwestern part of the ADI, approximately 30 miles east of WNNE-TV's city of license.

9. In support of its petition, WNNE-TV states that it has been carried since at least 1984 on the cable system serving the communities in question, and in support of this submits statements of account filed with the United States Copyright Office by the cable system. WNNE-TV notes that the communities in question are all nearby, within the station's predicted Grade A contour, in a county adjacent to WNNE-TV's city of license, and that the station is the nearest NBC affiliate to the communities in question. In addition, states WNNE-TV, it maintains nearby Television Translator Station W65AM, licensed to White River Junction, Vermont and located in West Lebanon, New Hampshire, some 22 to 25 miles west of the communities in question, as well as a mobile uplink truck (Station E874053) to serve the area. Approximately 50 businesses in Grafton County advertised on WNNE-TV in 1992, the station notes, underscoring its links with the communities in question. WNNE-TV also specifically cites news stories affecting Bristol and other Grafton County communities that it has carried recently, as well as public service announcements for various Grafton County organizations, and also weather warnings. The commercial stations entitled to mandatory carriage in the communities in question by virtue of the communities' assignation by Arbitron to the Portland-Poland Spring, Maine ADI are located approximately 77 miles from the communities, and, WNNE-TV contends, do not target their programming to the communities or Grafton County at all. In fact, states WNNE-TV, two of these licensees--Stations WCSH-TV (NBC, Channel 6) and WPXT (Ind., Channel 51), both Portland, Maine--do not even place a predicted Grade B contour over the communities in question. Finally, with regard to viewing patterns in the communities, WNNE-TV

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] *MM Docket No. 92-259,* 8 FCC Rcd at 2977, 2977 n.139.
[8] 47 C.F.R. §76.59.
[9] *MM Docket No. 92-259,* 8 FCC Rcd at 2981.

states that it exceeds the criteria for it to be deemed to be significantly viewed in the communities, citing 1992 Nielsen data.[10] In addition, WNNE-TV notes that although Grafton County was assigned by Arbitron to the Portland-Poland Spring, Maine ADI for 1991-92, the defining year according to the Commission's Rules,[11] Grafton County has since been reassigned by Arbitron to the Burlington, Vermont-Plattsburgh, (New York ADI for 1992-93, as it has been for much of the past two decades.[12]

10. In opposition to WNNE-TV, WMTW-TV argues that WNNE-TV's history of carriage in the communities in question is irrelevant because the local cable system "carries a full complement of network and independent stations, including two other NBC affiliates." In addition, WMTW-TV claims that it devotes more time to local news coverage than does WNNE-TV, citing coverage of "45 to 50 New Hampshire news stories each week," including stories particular to Portsmouth, Ossippee, North Conway, and Greenland, New Hampshire.

11. In reply, WNNE-TV argues that it provides the most "regular, consistent, and systematic coverage of events and news in the [c]ommunities" of any commercial licensee, and notes that the news stories cited by WMTW-TV all concern communities outside of Grafton County.

ANALYSIS AND DECISION

12. We shall grant WNNE-TV's petition. We first note that WNNE-TV has demonstrated a history of carriage in the communities in question. Second, WNNE-TV has shown that it provides coverage of and service to Alexandria, Bridgewater, Bristol, and Hebron, New Hampshire. The communities are all located within the station's predicted Grade A contour, which is sufficient to satisfy this factor.[13] While this may be challenged by a demonstration that a given station in fact does not provide actual programming to a community (or communities) at issue, WMTW-TV does not do this. Instead, WMTW-TV merely claims that its own news coverage is better. However, WMTW-TV cites programming specific not to the communities in question, but to communities across the state from them, near the border with Maine. This is not a sufficient rebuttal to WNNE-TV's submission on this point, which also includes examples of the station's programming to Bristol. With respect to viewing patterns, WNNE-TV submits Nielsen data that indicate that the station achieves levels of viewing in both cable and noncable households in Grafton County that would deem it to be significantly viewed. This is also reflected in recent Arbitron data.[14] We recognize that this determination is based on county-wide data, rather than on community-specific data. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type.

13. WNNE-TV satisfies the first, second, and fourth factors in the 1992 Cable Act with respect to Alexandria, Bridgewater, Bristol, and Hebron, New Hampshire. With respect to the third factor, WNNE-TV alleges but does not demonstrate conclusively that stations licensed to communities within the Portland-Poland Spring, Maine ADI do not provide coverage of and programming to the communities in question, although we recognize that WCSH-TV and WPXT do not even place predicted Grade B contours over the communities, and WMTW-TV fails to cite on its own behalf programming specific to the communities. Station WGME-TV (CBS, Channel 13), Portland, Maine, however, does encompass the communities with a predicted Grade B contour. Nevertheless, we do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, accepting that at least Station WGME-TV appears to serve the communities in question, this enhancement factor would not appear to be applicable. WNNE-TV's showing on each of the other factors, however, is sufficient and, in addition, we also note that the communities in question have frequently been assigned to the Burlington, Vermont-Plattsburgh, New York ADI during the past several years. Accordingly, even absent enhancement under the third criterion, grant of WNNE-TV's request is warranted.

14. Accordingly, for purposes of determining mandatory signal carriage obligations, we shall consider the communities of Alexandria, Bridgewater, Bristol, and Hebron, New Hampshire to be part of the Burlington, Vermont-Plattsburgh, New York ADI with respect to WNNE-TV, as well as within the Portland-Poland Spring, Maine ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

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[10] For a network station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. §76.5(i). Citing the 1992 Nielsen Station Index, *County by County Report*, WNNE-TV states its Grafton County viewing was: "Total viewing: 789 households, 10% share; non-cable households: 163 households, 11% share; average weekly cume: 51%; cable households (by extrapolation), 626 households, representing 79% of WNNE-TV's viewing in Grafton County."

[11] "For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 *Television ADI Market Guide* . . . will apply." 47 C.F.R. §76.55(e) and Note.

[12] WNNE-TV notes that Grafton County has been assigned to the Burlington, Vermont-Plattsburgh, New York ADI by Arbitron for 1976-77, 1978-79, 1982-83, 1983-84, 1986-87, 1988-89, 1989-90, and 1992-93. WNNE-TV also states that "Nielsen has assigned Grafton to the Burlington ADI continuously since 1986."

[13] *See MM Docket No. 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[14] According to recent Arbitron data, WNNE-TV achieves a share of viewing hours in noncable homes of 8% and a net weekly circulation of 26%. In cable homes the station's share of viewing hours is 6% and its net weekly circulation is 47%. Arbitron, *Television County Coverage: New Hampshire* (Cable Controlled Counties), 1992.

ORDER

15. In view of the foregoing, we find that grant of WNNE-TV's petition is in the public interest.

16. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed June 1, 1993 by WNNE-TV, Inc. IS GRANTED. This change shall be effective in accordance with the following schedule: WNNE-TV shall notify Continental Cablevision in writing of its carriage and channel position elections (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

17. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.[15]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[15] Pursuant to *MM Docket No. 92-259*, 8 FCC Rcd at 2978 n. 150, the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in the 1992 Cable Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

LIMA COMMUNICATIONS CORPORATION
Lima, Ohio

CSR-3825-A

For Modification of Station
WLIO-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: December 8, 1993; Released: January 18, 1994

By the Chief, Mass Media Bureau:

INTRODUCTION

1. Lima Communications Corporation ["WLIO-TV"], licensee of Station WLIO-TV (NBC, Channel 35), Lima, Ohio, has filed the captioned petition for special relief seeking to include 98 communities in Auglaize, Hancock, Hardin, Mercer, Putnam, and Van Wert Counties, Ohio, within the Lima, Ohio "area of dominant influence" for purposes of the cable television mandatory broadcast signal carriage rules.[1] WLIO-TV's petition is opposed by Outlet Broadcasting, Inc. ["WCMH-TV"], licensee of Station WCMH-TV (NBC, Channel 4), Columbus, Ohio, and by Findlay TV Corporation ["W47BD"], licensee of Low Power Television Station W47BD (Channel 47), Findlay, Ohio. In addition, Corporation for General Trade ["WKJG-TV"], licensee of Station WKJG-TV (NBC, Channel 33), Fort Wayne, Indiana, has filed comments on WLIO-TV's petition. WLIO-TV has replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection "and Competition Act of 1992 ["1992 Cable Act"][2] and implementing "rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular

[1] WLIO-TV initially sought also to include a ninety-ninth community--Mt. Victory, Ohio--within the Lima, Ohio area of dominant influence. This portion of the petition has been withdrawn. A list of all 98 communities in which WLIO-TV seeks mandatory carriage rights is contained in the Appendix.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in *MM Docket No. 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

Id. at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities here in question are located in six Ohio counties in four ADIs. The communities in Auglaize and Mercer Counties are located in the Dayton, Ohio ADI. The communities in Hardin County are located in the Columbus, Ohio ADI. The communities in Hancock and Putnam Counties are located in the Toledo, Ohio ADI. The communities in Van Wert County are located in the Fort Wayne, Indiana ADI. WLIO-TV's Lima, Ohio ADI consists solely of Allen County, and the counties here in question surround Allen County on all sides, largely within WLIO-TV's 35-mile zone and all within the station's 55-mile zone. In addition, WLIO-TV's predicted Grade B contour covers virtually all of the communities in question.

9. In support of its petition, WLIO-TV states that it has been "carried on virtually all of the systems involved . . . for a substantial period of time . . . ." WLIO-TV further states that it provides a substantial amount of news and other programming that is responsive to local issues and concerns in the communities in question, and lists or summarizes several examples of such programming since 1991, and also submits a videotape. In addition, WLIO-TV argues that there is a community of interest between its city of license and ADI and the communities WLIO-TV seeks to add to its ADI. Auglaize, Hancock, and Hardin Counties, WLIO-TV notes, are in the same congressional district as is Allen County. WLIO-TV also states that Mercer, Putnam, and Van Wert Counties are nearer to Lima than to any other Ohio station's city of license, and that the counties are not in the same congressional districts as the latter three communities. With respect to area viewing patterns, WLIO-TV states that it is significantly viewed in Auglaize, Mercer, Putnam, and Van Wert Counties,[11] and

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[8] *MM Docket No. 92-259*, 8 FCC Rcd at 2977, 2977 n.139.
[9] 47 C.F.R. §76.59.
[10] *MM Docket No. 92-259*, 8 FCC Rcd at 2981.
[11] *See Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 435-437 app. B (1972). For a network station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. §76.5(i).

that 1992 Arbitron county coverage data for cable and noncable homes combined in all six counties shows that the station currently meets or exceeds the significantly viewed criteria in these counties. This data, too, WLIO-TV contends, shows that "WLIO-TV's audiences are similar to or greater than those of ADI NBC affiliates," as follows:

County and Station	Total Share	Net Weekly Circulation
Auglaize County		
WLIO-TV (NBC, Ch. 35), Lima OH	28	84
WKEF (NBC, Ch. 22), Dayton OH	2	30
WTVG (NBC, Ch. 13), Toledo OH	1	6
Hancock County		
WLIO-TV (NBC, Ch. 35), Lima OH	4	36
WTVG (NBC, Ch. 13), Toledo OH	21	87
Hardin County		
WLIO-TV (NBC, Ch. 35), Lima OH	10	46
WCMH-TV (NBC, Ch. 4), Columbus OH	11	46
WTVG (NBC, Ch. 13), Toledo OH	12	45
Mercer County		
WLIO-TV (NBC, Ch. 35), Lima OH	12	64
WKEF (NBC, Ch. 22), Dayton OH	1	22
WKJG-TV (NBC, Ch. 33), Fort Wayne IN	5	46
Putnam County		
WLIO-TV (NBC, Ch. 35), Lima OH	9	57
WTVG (NBC, Ch. 13), Toledo OH	17	70
WKJG-TV (NBC, Ch. 33), Fort Wayne IN	1	13
Van Wert County		
WLIO-TV (NBC, Ch. 35), Lima OH	10	66
WKJG-TV (NBC, Ch. 33), Fort Wayne IN	12	72

WLIO-TV also notes that in a recent promotion in which it offered its viewers a schedule of the station's Cincinnati Reds baseball broadcasts, it received "numerous" requests from residents of the counties in question, and that requests from Auglaize, Hancock, Hardin, Mercer, and Van Wert Counties constituted 54 percent of the requests received by the station.[12] WLIO-TV contends that a single county ADI cannot and does not accurately reflect the station's actual market and service area, and urges grant of its petition.

10. WCMH-TV, in opposition to WLIO-TV, argues that WLIO-TV's request "vastly exceeds the scope of relief permissible by statute," seeking the addition of six entire counties to the station's ADI, rather than specific communities. Although WLIO-TV's petition is couched as involving communities, states WCMH-TV, most of the station's supporting data is provided on a county-by-county basis, and what community-specific information is provided is inadequate to justify relief. Focusing on Hardin County--the one county in question within WCMH-TV's ADI--WCMH-TV claims that WLIO-TV's submissions show only that it was carried on Hardin County cable systems in September 1989 and in March 1993, rather than demonstrating continuous carriage between these dates, nor any carriage from the time that WLIO-TV went on the air in 1953 until September 1989. Unlike other counties which are encompassed by WLIO-TV's Grade A contour, notes WCMH-TV, Hardin County is only partially encompassed by the station's Grade B contour. Nor, contends WCMH-TV, should Grade B coverage alone be determinative. With regard to specific programming, WCMH-TV notes that WLIO-TV essentially only lists issues of concern to Hardin County communities which the station claims to have addressed, rather than specific examples of programming addressing those issues, with the exception of "Field Dog Trials" on certain days in 1992 and 1993. WCMH-TV states that WLIO-TV provides no evidence on the third statutory factor--the provision of local service by other stations entitled to carriage--which ignores WCMH-TV's extensive coverage of Hardin County news and events. Finally, WCMH-TV notes that WLIO-TV provides only county viewership data rather than the requisite community-specific data, which reveal low viewing shares for WLIO-TV in any event. This is underscored, argues WCMH-TV, by the fact that of the responses WLIO-TV received to its cited baseball schedule promotion, only 3 percent came from Hardin County.

11. W47BD, in opposition to WLIO-TV, argues that with respect to Hancock County--the county within which W47BD's city of license is located--WLIO-TV provides "very little coverage of news or events . . . ," which are more extensively covered by W47BD and by Toledo ADI stations. W47BD notes that it was chosen media pool coordinator for President Bush's visit to Hancock County in 1992, and not WLIO-TV, which also, according to W47BD, has not participated in covering other significant local political events in the county. In fact, contends W47BD, the information submitted by WLIO-TV "mentioned only nine dates in the last two years when WLIO-TV broadcast news of Findlay or Hancock County, Ohio," let alone any other Hancock County communities. Nor does WLIO-TV indicate that it covers any local community sporting events in Hancock County, states W47BD. With regard to viewing data, W47BD asserts that WLIO-TV's own submissions show that it garners little viewing in Hancock County, and that the station's own marketing materials which it submitted make no mention of Hancock County. Grant of WLIO-TV's petition, W47BD contends, would diminish the

[12] Specifically, WLIO-TV notes that 13 percent came from Auglaize County; 11 percent came from Hancock County; 3 percent came from Hardin County; 8 percent came from Mercer County; and 19 percent came from Van Wert County. WLIO-TV also notes that it received requests from Putnam County, but does not quantify this group of requests.

number of available channels on Hancock County cable systems that could otherwise carry W47BD, which provides significant local news, sports, and other events coverage to Findlay, Ohio and other Hancock County communities.[13]

12. In commenting on WLIO-TV's petition as it affects Van Wert County (in the Fort Wayne, Indiana ADI) and Mercer County (in the Dayton, Ohio ADI), WKJG-TV notes that it is licensed to Fort Wayne, Indiana, and is a local NBC station for Van Wert County. In addition, WKJG-TV states that it, too, is seeking to expand its own carriage rights to Mercer County. However, states WKJG-TV, if the Commission is willing to grant both WKJG-TV and WLIO-TV mandatory carriage rights in a given county--that is, to consider a given county (or communities) to be in more than one ADI for mandatory signal carriage purposes, rather than transferring a county (or communities) from one ADI to another--then the Commission should consider WLIO-TV's petition.

13. In reply, WLIO-TV states that it indeed seeks carriage in 98 specific communities, contrary to WCMH-TV's assertion. As for WLIO-TV's history of carriage, WLIO-TV notes that WCMH-TV does not show that WLIO-TV has been dropped from any system between 1989 and 1992, and that in any event a review of the *Television & Cable Factbook*, Cable and Services volumes for the past ten years confirms this, as well as WLIO-TV's carriage since 1983. WLIO-TV reiterates that its provision of Grade B service to the communities in question, while not determinative, is a factor supporting its petition. WLIO-TV submits additional exhibits that indicate that since January 1992 the station has aired 75 Hardin County news stories and 53 stories concerning Hardin County sports events, in contrast to WCMH-TV's 5 news stories and 22 sports mentions. Turning to W47BD's claims,[14] WLIO-TV states that it does provide significant coverage of news, sports, and other events of concern to Findlay, Ohio, and other Hancock County communities. Specifically, WLIO-TV submits a list of 42 news stories (nearly half concerning the 1992 presidential election) and 38 sports stories it has covered (focusing mostly on Findlay) since January 1992 as demonstrating its Hancock County coverage. Moreover, WLIO-TV notes that it did provide extensive coverage of President Bush's visit to Hancock County, albeit in a manner different than that of W47BD. With regard to viewership data, WLIO-TV maintains that the county data submitted sufficiently justifies grant of WLIO-TV's petition. That other NBC stations may enjoy viewership similar to or greater than that of WLIO-TV is irrelevant to the fact of the significant viewership that WLIO-TV does enjoy. Finally, WLIO-TV notes that WKJG-TV does not object to WLIO-TV's petition, and agrees that it is possible for two affiliates of the same network to have mandatory carriage rights in the same county.

ANALYSIS AND DECISION

14. We shall grant WLIO-TV's petition with respect to Auglaize, Hardin, Mercer, Putnam, and Van Wert Counties. We first note that WLIO-TV demonstrates a history of carriage on the cable systems serving the communities in question, WCMH-TV's unsupported suggestions to the contrary notwithstanding. Second, WLIO-TV has shown that it provides coverage of and service to the communities in question. The station's predicted Grade B contour encompasses all of the communities in question. We have previously stated that this is sufficient to satisfy this factor.[15] Nevertheless, this may be challenged by a demonstration that a given station in fact does not provide actual programming to a community or communities at issue, as both WCMH-TV and W47BD have attempted in the present case, with respect to Hardin and Hancock Counties, respectively. In response to WCMH-TV, however, WLIO-TV has submitted evidence of its programming specific to many of the communities in question in Hardin County, covering a wide variety of stories of interest and concern to these communities. With respect to the fourth factor, WLIO-TV has submitted evidence that it meets or exceeds the significantly viewed criteria in the affected communities, save for those located in Hancock County. We recognize that these data are county-based, rather than community-specific. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type.

15. With respect to all but the communities located in Hancock County , WLIO-TV satisfies the first, second, and fourth factors in the 1992 Cable Act. While WLIO-TV does not address the third factor, we nonetheless conclude that WLIO-TV has justified its request to include the communities in question, save for those located in Hancock County, within its ADI. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of anyH& broadcast signals that might provide programming geared to their communities. In this case, because other stations do appear to serve the communities named by WLIO-TV, this enhancement factor

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[13] Both §4 of the 1992 Cable Act and §76.55(d) of the Commission's Rules set forth the criteria for a low power television station to qualify for mandatory carriage rights. W47BD states that it meets all but one of the criteria, which is that the 1990 population of the station's community of license not exceed 35,000. The 1990 population of Findlay, Ohio, states W47BD, was 35,703.

[14] WLIO-TV argues that W47BD's opposition should be dismissed for lack on standing on W47BD's part. Since W47BD concedes that it lacks mandatory carriage rights, contends WLIO-TV, W47BD cannot be *directly* affected by grant of WLIO-TV's petition, and is therefore not an interested person pursuant to §76.7(b) of the Commission's Rules, and therefore cannot file an opposition pursuant to §76.7(d) of the Commission's Rules. However, "[w]e have previously stated that 'we intend to construe "interested person" . . . as broadly as reasonably possible.' *Focus Cable of Oakland, Inc.* (Oakland, California), FCC 74-300, 46 FCC 2d 112 (1974)." *Marsh Media, Ltd.*, 67 FCC 2d 1516, 1522 (1978). We believe that, in the present case, it is reasonable to afford W47BD the opportunity to oppose WLIO-TV's petition.

[15] *MM Docket No. 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

would not appear applicable. WLIO-TV's showing on each of the other factors, however, is sufficient and, even absent enhancement under the third criterion, warrants grant of its request, except with regard to the communities located in Hancock County.

16. With respect to Hancock County, WLIO-TV has only demonstrated historic carriage, satisfying only the first criterion. In response to W47BD's challenge to WLIO-TV's submissions, WLIO-TV fails to show that it serves Hancock County communities. Little coverage of news or events concerning Hancock County communities--with the exception of Findlay--appears to be provided by WLIO-TV, and nearly half of WLIO-TV's Hancock County news coverage focused on a single story, the 1992 presidential election. Indeed, WLIO-TV's marketing materials fail even to mention Hancock County. Accordingly, despite the presence of WLIO-TV's predicted Grade B contour over part of Hancock County (five Hancock County communities--Arcadia, Big Lick Township, Fostoria, Vanlue, and Washington Township--are located outside of WLIO-TV's predicted Grade B contour), we find that W47BD has sufficiently rebutted the presumption of local service created by this, and WLIO-TV's further submissions have not overcome this rebuttal, except with respect to Findlay. As other stations serve these communities, the enhancing third factor is not applicable. With regard to the final factor, although the viewership data submitted and available is county-based, we do note that in the six counties affected by this petition, WLIO-TV achieves its lowest viewing levels in Hancock County. We recognize that these viewership levels indicate that WLIO-TV exceeds the significantly viewed criteria in both cable and noncable homes in Hancock County. Nevertheless, this is only county-wide data, and, in the face of W47BD's submissions and the other factors noted above which suggest that such data may not in fact be fairly reflective of viewing in the actual communities in question, we cannot place probative value on this county-wide data for Hancock County. WLIO-TV, therefore, fails to satisfy this final factor, too, with respect to Hancock County. Therefore, WLIO-TV has satisfied only one of the four factors with respect to communities located within Hancock County, save for Findlay. With respect to Findlay, WLIO-TV satisfies both the first and second factors. In addition, as Findlay is the most populous community in Hancock County and is specifically programmed to by WLIO-TV, it is likely to be responsible for most of WLIO-TV's viewership in the county. Accordingly, it appears that WLIO-TV satisfies the fourth factor as well with respect to Findlay, and WLIO-TV's petition will be granted with respect to Findlay as well.

17. Accordingly, for purposes of determining mandatory signal carriage obligations, we shall consider the communities listed in the Appendix in Auglaize, Hardin, Mercer, Putnam, and Van Wert Counties; and also the community of Findlay in Hancock County, to be part of the Lima, Ohio ADI with respect to WLIO-TV, as well as within the communities' current ADIs. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra.*

ORDER

18. In view of the foregoing, we find that grant of WLIO-TV's petition, to the extent indicated above, is in the public interest.

19. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed May 12, 1993 by Lima Communications Corporation IS GRANTED to the extent indicated at paragraph 17, *supra,* and in all other respects IS DENIED. This change shall be effective in accordance with the following schedule: WLIO-TV shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order.* The affected cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

20. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by §0.283 of the Commission's Rules.[16]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[16] Pursuant to *MM Docket No. 92-259,* 8 FCC Rcd at 2978 n. 150, the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in the 1992 Cable Act.

APPENDIX

Communities Subject to WLIO-TV's Petition

County (ADI)	Communities
AUGLAIZE (Dayton OH)	Buckland, Cridersville, Indian Lake, Long Island, Minster, Moulton, New Bremen, New Hampshire, New Knoxville, North Side, Northfork, Roundhead, St. Johns, St. Marys, Stokes Township, Uniopolis, Villa Nova, Wapakoneta, Waynesfield
HANCOCK (Toledo OH)*	Allen Township, Alvada, Amanda Township, Arcadia, Arlington, Benton Ridge, Big Lick Township, Blanchard, Bluffton, Findlay, Fostoria, Jackson Township, Jenera, Liberty Township, Marion Township, McComb, Mt. Blanchard, Mt. Cory, Rawson, Union Township, Van Buren, Vanlue, Washington Township
HARDIN (Columbus OH)	Ada, Alger, Forest, Hale Township, Kenton, McGuffey, Patterson, Ridgeway, Victory
MERCER (Dayton OH)	Butler Township, Celina, Chickasaw, Coldwater, Franklin Township, Granville Township, Jefferson Township, Maria Stein, Mendon, Montezuma, Rockford, St. Henry, Southmoor Shores
PUTNAM (Toledo OH)	Blanchard Township, Cloverdale, Columbus Grove, Continental, Dupont, Fort Jennings, Gilboa, Glandorf, Greensburg Township, Jackson, Jackson Township, Jennings, Kalida, Leipsic, Miller City, Monterey Township, Ottawa, Ottawa Township, Ottoville, Pandora, Perry, Perry Township, Pleasant Township, Union Township, West Leipsic
VAN WERT (Fort Wayne IN)	Delphos, Hoaglin Township, Jackson, Jackson Township, Middle Point, Ohio City, Van Wert, Willshire, Wren

* relief only granted with respect to Findlay in Hancock County

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 5, 1994

Released: January 18, 1994

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Fairview Communications, Inc. HN1800C1
Licensee, Station WBHT-FM HN9306104
Phoenix Plaza Sixth Floor
16-22 East Union Street
Wilkes-Barre, Pennsylvania 18702

Att: Robert Crawford, President

Dear Mr. Crawford:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, for violation of Section 73.1206 of the Commission's Rules (broadcast of telephone conversations). This action is being taken by authority delegated to the Chief, Mass Media Bureau, pursuant to Section 0.283(c)(3) of the Commission's Rules.

By letter of July 21, 1993, we inquired into an alleged violation of Section 73.1206 of the Commission's Rules regarding the broadcast of telephone conversations.[1] Section 73.1206 in pertinent part requires that before broadcasting a telephone conversation live, or recording it for broadcast, a licensee must inform any party to the call of the licensee's intention either to record the conversation for broadcast or to broadcast the call simultaneously with its occurrence. Our letter reported a complaint that on or about May 27, 1993, a disc jockey named Renee from Station WBHT-FM (formerly WYXY-FM) placed a telephone call to the office of the Mayor of Kingston, Pennsylvania, spoke with Ms. Kathleen Mras, Municipal Secretary, recorded the conversation, and broadcast it over the air. Ms. Mras was not informed of the intended broadcast of the conversation.

Your reply of August 20, 1993, concedes the violation of Commission Rules. You state that you have taken steps to prevent a recurrence of such incidents, including (1) issuing a reprimand and warning to the on-air personnel involved, (2) issuing a memorandum concerning the rule to all station personnel, and (3) issuing an apology to Kingston's Mayor and Municipal Secretary.

You have conceded that you have violated Section 73.1206 of the Commission's Rules by broadcasting the telephone conversation described above. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Fairview Communications, Inc., Licensee of Station WBHT-FM, is hereby advised of its apparent liability for a forfeiture of five thousand dollars ($5,000) for its willful violation of Section 73.1206 of the Commission's Rules on May 27, 1993.

The forfeiture amount specified was reached after consideration of the factors set forth in Section 503(b)(3) of the Act and guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Under these guidelines, the base amount for violation of our rule concerning the broadcast of telephone conversations is five thousand dollars ($5,000).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed, or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] We also inquired into an alleged solicitation of funds by station personnel for the Municipality of Kingston. In light of your response to this inquiry, we take no further action in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Roberts Cellular, Inc. — File No. 54792-CL-P-199-A-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on frequency Block A in Market 199, Steubenville - Weirton, Ohio-West Virginia Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1994; Released: January 18, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Bureau is a Petition for Reconsideration filed by Roberts Cellular, Inc. (Roberts Cellular)[1] of the decision by the Bureau's Mobile Services Division (MSD) to dismiss the captioned Roberts Cellular application for lack of a reasonable assurance of site availability at the time the application was filed. *Roberts Cellular, Inc.*, 5 FCC Rcd 1357 (Mobile Serv. Div. 1990).[2] Prior to the dismissal, the application had been announced as the tentative selectee of the lottery for the Steubenville-Weirton, Ohio-West Virginia Metropolitan Statistical Area (Steubenville MSA).[3] McLang Co. (McLang), who had been selected second in the Steubenville MSA lottery and is the current holder of the authorization to provide service,[4] filed an Opposition to the Petition (Opposition). Roberts Cellular filed a Motion for Leave to File Reply and a Reply.[5]

II. BACKGROUND

2. After the announcement of Roberts Cellular as tentative selectee, the MSD discovered that 100 applications from or near Crossville, Tennessee, including Roberts Cellular's application, were filed in MSAs 181-240 (Crossville-related applications). The MSD found that a Mr. Thomas Looney (Looney), an attorney from Crossville, Tennessee, had distributed the applications to these applicants and that all of the Crossville-related applications contained common engineering exhibits by Satellite Systems Engineering, Inc. (SSE). Crossville-related applicants were lottery winners in 12 of the MSAs and had become tentative selectees prior to the MSD's inquiry.

3. The MSD began investigating the circumstances surrounding the filing of these applications. On May 28, 1987, the MSD sent letters to the 12 Crossville-related tentative selectees, including Roberts Cellular, seeking information on the filing of their applications. The letters from the MSD stated that it had information that the 12 tentative selectees, including Roberts Cellular, might not be the real parties in interest behind their applications and inquired whether they were parties to any agreements transferring a controlling interest either to Looney or anyone else, contrary to Sections 22.13(a) and 22.913 of the Rules.[6] The letters also asked who had paid for services rendered to the applicants, and what amounts had been paid.

4. On June 18, 1987, Roberts Cellular, along with 9 of the other tentative selectees, responded. Also, on that date, the Commission announced that it was conducting an investigation of the 12 Crossville-related tentative selectees. *See Public Notice*, No. FCC 87-219, 2 FCC Rcd 3958 (1987).[7] On October 6, 1987, the Commission announced that it was referring the matter to the Department of

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[1] Roberts Cellular originally filed as John M. Roberts (Roberts), May 1, 1986. The application was amended, December 19, 1986, to reflect a *pro forma* change to a solely owned corporation.

[2] In its decision, the MSD also dismissed two applicants, for the Jackson, Michigan MSA (market 207) and the Fargo, North Dakota MSA (market 221), who subsequently reached settlements. Those proceedings have become final.

[3] *See* Public Notice, Report No. CL-87-61 (released Nov. 20, 1986).

[4] After the Roberts Cellular application was dismissed, McLang was announced as the tentative selectee and subsequently was granted an authorization. *See* Public Notice, Report No. CL-90-241 (released July 6, 1990).

[5] In response to the McLang opposition, Roberts Cellular filed on May 11, 1990, a Motion for Extension of Time to file a reply. The MSD granted the motion, May 14, 1990. On May 31, 1990, Roberts Cellular filed a further request for an extension of time to file a reply. The MSD denied this second time extension, June 7, 1990. Subsequently, Roberts Cellular filed on June 14, 1990, a Petition for Leave to File Reply (Petition for Leave) and a Reply; McLang filed on June 25, 1990, a formal Opposition to the Petition for Leave to File Reply. In addition, on July 3, 1990, McLang filed a Motion for Leave to Respond (Motion) and a Response to Reply. In order to give fair consideration to all aspects of this case, we are granting Roberts Cellular's Petition for Leave of June 14, 1990, and McLang's Motion of June 25, 1990.

[6] Section 22.13(a) provides that "[e]ach application for a radio station authorization . . . shall: (1) disclose fully the real party or parties in interest that are engaged in the Public Mobile Services . . . ." *See* 47 C.F.R. § 22.13(a). Section 22.913(a)(10), in effect at the time Roberts filed its application, required:

> [a]n exhibit setting forth the information required by Section 22.13(a)(1). In addition, all applicants other than publicly traded corporations must disclose parties with any ownership interest in another cellular application for the same market.

See 47 C.F.R. § 22.913(a)(10).

[7] The Commission also suspended the *ex parte* rules in all 12 markets. *See* 47 C.F.R. § 1.1208 *et seq.* As a result, communications made to the Commission in connection with the investigation did not have to be disclosed. The suspension of the *ex parte* rules is still in effect. McLang's earlier request for reconsideration of the suspension of the *ex parte* rules was denied. *John M. Roberts*, 3 FCC Rcd 371 (1988), *petition for review dismissed sub nom . McLang Co. v. FCC*, No. 88-1192 (D.C. Cir., July 29, 1988).

Justice for further investigation.[8] While the applications remained pending, several petitions were filed regarding allegations of a concerted, massive filing scheme to skew the lottery in the fourth filing round (MSAs 181-240).[9] Subsequently, eight Crossville-related tentative selectees filed amendments and requested dismissal of their applications following settlement. *See Public Notice*, Report No. CL-89-90 (released Feb. 16, 1989).

5. In dismissing Roberts Cellular's application, the MSD found that the application lacked a reasonable assurance of site availability as required by Section 22.15(a)(1) of the Commission's Rules. *See Roberts Cellular, Inc.*, 5 FCC Rcd at 1361-62. As a result, it found that it would be unnecessarily duplicative to designate real party in interest, misrepresentation, and transfer of control issues for hearing. *See id.* The MSD found that it was undisputed that the application of Roberts Cellular was prepared by Looney, but that it was SSE or its agents, and not Looney or the applicant, who contacted the owners of the proposed cell sites and received assurances of site availability. The site information was part of the engineering exhibits that SSE prepared and subsequently sold to Early D. Monroe (Monroe).

6. In addition, the MSD found that it was undisputed that Looney obtained the engineering information from Monroe, who was not authorized to sell this information to Looney and that neither Monroe nor SSE was the agent of the applicant at the time the application was filed. The MSD determined that Roberts and his agent, Looney, did not contact the site owners and receive a reasonable assurance of the availability of the cell sites in the application prior to filing. The MSD also noted that Roberts falsely certified in the application that Roberts Cellular had a reasonable assurance of site availability. *Roberts Cellular*, 5 FCC Rcd at 1364, n.22.

III. DISCUSSION

A. Site Availability

1. Reasonable Assurance of Availability

a. Pleadings

7. Roberts Cellular argues that the MSD erroneously relied on *Onyx Cellular Corporation*, 3 FCC Rcd 4836 (Com. Car. Bur. 1986) and *CPS Telecom, Inc.*, 2 FCC Rcd 4060 (Mobile Serv. Div. 1987) for the proposition that the Roberts Cellular application must be dismissed because neither Roberts nor his agent, Looney, contacted the site owners. In those cases, asserts Roberts Cellular, no one contacted the site owners before the applications were filed. In this case, in contrast, SSE contacted the site owners before the application was filed.

8. Roberts Cellular further contends that the MSD misapplied two cases that actually support acceptance of its application. First, Roberts Cellular argues that the Bureau affirmed acceptance of an application, even though there was no legal agency relationship between the applicant and the county government that was the site owner, just as the MSD claims no such relationship existed between Roberts and either SSE or Monroe.[10] It further contends that, in comparison, the MSD dismissed the Roberts Cellular application, even though the applicant relied on his twenty-plus year relationship with Looney to meet the reasonable assurance test.[11] In the second case, Roberts Cellular asserts, the Commission credited an applicant with good faith reliance on his agent, a real estate broker, to establish reasonable assurance of proposed site availability even though the broker was not authorized by the site owner to list the property and could not in any way be considered an agent or representative of the site owner. *Millard V. Oakley*, 42 R.R. 2d 1495, 1499 (1978) (*Oakley*). Roberts Cellular contends that no Commission case has relied on analysis of the law of agency to determine whether there was reasonable site assurance, and that under such an approach, the Commission would have to resolve complicated questions of law or fact by tracing the chain of authority through every agent or representative.

9. McLang responds that Roberts Cellular's interpretation of the *Gardner* and *Oakley* cases, that applicants need not contact site owners directly but can properly act through agents, is irrelevant in view of the facts here. McLang also asserts that Roberts Cellular wants the Commission to rule that as long as any person may have made adequate pre-application arrangements for a particular site, then it is reasonable for everyone else to assume blindly the availability of the site. It is well established, submits McLang, that mere belief or possibility that a site will be available will not suffice. *William F. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974).

10. Roberts Cellular next asserts that a settlement agreement, executed December 16, 1986, between SSE and Roberts, confirms that it does possess reasonable assurance of site availability. Roberts Cellular quotes from the agreement that "SSE authorizes [Roberts] to use Application Materials in future FCC proceedings relating to the Cellular Application filed by [Roberts] . . .;" that "[Roberts] represents that he obtained the Application material . . . from Looney, and believed in good faith that (i) Looney was authorized to provide the Application Materials to [Roberts], and (ii) [Roberts] was authorized to use [them]."[12] Roberts Cellular acknowledges that $3,000 was

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[8] *See* Public Notice, Report No. CL-88-4 (released Oct. 4, 1987). Since the issuance of the MSD's decision in *Roberts Cellular, Inc.*, the Justice Department has terminated its investigation and declined to prosecute.

[9] *See Roberts Cellular*, 5 FCC Rcd at 1358 (summarizing McLang Motion to Consolidate for Hearing the applications of pending Crossville-related tentative selectees, announced in Public Notice, Report No. CL-88-146 (released Aug. 15, 1988); Petition to Dismiss or Deny the tentative selectee and second ranked selectee, in Market 193, alleging a filing scheme to skew the lottery to benefit a few individuals, including Looney (filed Apr. 7, 1988)).

[10] *Robert and Patricia Gardner*, 2 FCC Rcd 1928 (Mobile Serv. Div. 1987), *aff'd*, 2 FCC Rcd 4686 (Com. Car. Bur. 1987) (*Gardner*).

[11] *See* Petition, p. 19; Roberts Cellular's June 1987 response.

[12] *See* Petition, pp. 10-11. We note that Roberts Cellular did not submit a copy of the agreement with its Petition, but furnished it to McLang at McLang's request. *See* McLang Opposition, pp. 14-15 & Attachment J, "Cellular Market Settlement Agreement."

paid to SSE as part of the settlement.[13] Roberts also asserts that the MSD failed to consider the Declaration of the former SSE President, Wilbur Pritchard, filed in the Richland, Washington, MSA proceeding.[14] Pritchard states that "while [SSE] objected to [Monroe's] role in selling SSE work-product without compensating SSE, we have never, and do not now, object to the . . . use of SSE work-product, specifically the site availability certifications . . ., which were properly obtained prior to filing [the] Application."[15] Roberts Cellular also submits a second declaration from Pritchard with a similar statement that ". . . SSE never objected to the use of SSE's work-product by [the applicant, and] . . . that SSE had no objection to the reliance . . . on the site availability certifications obtained prior to the filing [of the application]."[16]

11. In its opposition, McLang replies that the basic findings by the MSD remain uncontested and are corroborated. McLang contends that the post-filing settlements reached by SSE do not rectify Roberts Cellular's failure to have reasonable assurance at the time it filed its application. McLang asserts that the Pritchard declarations only serve to confirm MSD's findings.

b. Discussion

12. Section 22.15 of the Commission's Rules requires that an ". . . applicant shall have obtained reasonable assurance that it can use the [proposed antenna] site[s] . . . " *See* 47 C.F.R. § 22.15 (a)(1). Thus, a cellular license applicant under Part 22 of the Rules must have reasonable assurance of the availability of its cell sites when it files its application. Therefore, an applicant must determine that there is space available on an existing building or tower, or in the case of a new structure, that the property is available for such use and that it is reasonable to anticipate that use. *Public Mobile Radio Services*, 95 FCC 2d 769, 778 (1983). Further, it is fundamental that a site owner or an agent must be contacted. *See Celcom Communications Corporation of Georgia*, 52 Rad. Reg. 2d (P&F) 1674, 1681 (Com. Car. Bur. 1983). *Onyx* and *CPS Telecom* stand for the principle that the assurance must come from the site owner either through contact by the applicant or its authorized agent with the site owner or the site owner's representative prior to the time of filing the application.

13. Moreover, the applicant is responsible for ensuring that it or its agent contacts site owners. Applicants are entirely responsible for the contents of their applications, *Lorain Community Broadcasting*, 18 FCC 2d 686 (1969), and are required to take affirmative steps to obtain reasonable assurance. We have stated that the reasonable assurance test requires that applicants take reasonable precautions in specifying sites. *See Charles Mitchell Dant*, 3 FCC Rcd 950 (Com. Car. Bur. 1988), *aff'g*, 2 FCC Rcd at 5584 (Mobile Serv. Div. 1987) (*Dant*). Furthermore, reliance upon oral statements or the representations of a consultant without demonstration of contact with the site owner or his or her agent or a showing of specific terms and conditions for the use of the site being negotiated does not evidence reasonable assurance. *See Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (Rev. Bd. 1987), *aff'g Initial Decision*, 2 FCC Rcd 1223 (ALJ 1987), *rev. denied*, 3 FCC Rcd 7186 (1988), *recon. denied*, 5 FCC Rcd 2509 (1990), *rev. and remanded in part sub. nom., Marin TV Services Partners, Ltd v. FCC*, 936 F.2d 1304 (D.C. Cir. 1991). *See also GTE Mobilenet of Portland, Inc.*, 53 Rad. Reg. 2d (P&F) 1490, 1495 (Com. Car. Bur. 1983) ("mere possibility" of site's availability will not suffice).[17] Otherwise, reasonable assurance could be found on bare assertions or assumptions of availability by agents or representatives. Thus, assumptions by applicants that sites are available to them from engineering of other competing applicants are also insufficient. *See Duchess Communications Corp.*, 101 FCC 2d 243, 253 (Rev. Bd. 1985) (applicant cannot negotiate an arrangement which is not *bona fide* and then represent reasonable assurance of a site; *also citing South Florida Broadcasting Co., Inc.*, 57 Rad. Reg. 2 (P&F) 495, 501-02 (Rev. Bd. 1984)). To demonstrate a reasonableness of anticipation, the applicant must show that a firm understanding was reached to use the site in the event he or she is granted a license. At a minimum, "a meeting of the minds resulting in some firm understanding as to the site's availability is essential." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988).

14. The required contact by either Roberts Cellular or its agent, Looney, with either the site owner or SSE, did not occur in this case prior to filing of the application. As the representative and application "preparer" for Roberts Cellular, Looney had only obtained the engineering material without any kind of agreement or firm understanding with SSE prior to filing that Roberts Cellular could use the sites that SSE had obtained. The "meeting of the minds" between SSE and Roberts Cellular, as indicated by their settlement agreement, did not occur until almost 6 months *after* the application was filed.

15. Roberts Cellular submits the agreement between Roberts and SSE and the Declaration of SSE's former President, Pritchard, to purport to show that SSE had no objection to Roberts Cellular's use of its engineering, including cell sites. That evidence, however, does not contradict the central finding by the MSD in this case, that the applicant did not have reasonable assurance of site availability *at the time it filed its application*. The agreement between Roberts and SSE does not show that Roberts (or Roberts Cellular) was authorized or permitted by SSE prior to filing to use its engineering. The agreement and the date that it was entered confirm what Roberts Cellular submitted in its June 1987 response: that Roberts obtained his application from Looney, that SSE informed either Roberts or Looney of a dispute in the use of its engineering, that $3,000 was paid to settle the dispute, and that all of the foregoing occurred after the application of Roberts Cellular was filed.

16. These facts from the June 1987 response do not support the statements relied upon by Roberts Cellular in the Pritchard declaration furnished in this proceeding re-

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[13] *See* Petition, p. 10 n.12, referring to Roberts Cellular's June 1987 response.

[14] *See id.*, p.11 & Exhibit 4. The Richland, Washington, MSA (market 214) also involved a Crossville-related applicant which became a tentative selectee. *See Roberts Cellular, Inc.*, 5 FCC Rcd at 1362.

[15] *See* Petition, Exhibit 4.

[16] *See id.*, Exhibit 5.

[17] The Commission has generally recognized the cross-application of case law between the broadcast and cellular services in defining "reasonable assurance." *See Public Mobile Radio Services*, 95 FCC 2d at 778.

garding SSE's asserted lack of objection to the use of its product, *i.e.*, the assurance for sites SSE had obtained prior to filing, and Roberts Cellular's reliance upon it.[18] Thus, no decisional weight can be afforded to the declaration. Roberts Cellular has presented no evidence of an arrangement or firm understanding with either SSE or the site owner or its representative *prior* to filing. Indeed, Roberts Cellular has shown nothing more than an assumption by Looney, coupled with its reliance on its twenty-plus year relationship with him, that Roberts Cellular could use the sites SSE had obtained. To allow applicants to assume that a site is available without establishing the necessary contact or firm understanding would disrupt the Commission's licensing process and penalize those applicants who actually made arrangements or entered into agreements demonstrating reasonable assurance of the site availability prior to filing. *See Duchess Communications Corp.*, 101 FCC 2d 243, 253 (Rev. Bd.1985).[19] Accordingly, we determine that Roberts Cellular did not have reasonable assurance of site availability when it filed its application.

17. Further, we find that Roberts Cellular's reliance on *Gardner* and *Oakley* is misplaced. We observed in *Gardner* that the applicant accepted the representation of an individual (the director of engineering for a cable company which had a lease agreement with the county) in a position to know the availability of his company's tower. *See Gardner*, 2 FCC Rcd at 4686. The applicant potentially stood in a direct subtenant relationship with the cable company to negotiate for improvement or replacement of the site facility. *See id.* Even though the director, who was not an agent of the county, later acknowledged that his interpretation of the agreement may have been in error, there was at least an understanding provided under the color of authority of the agreement with the county that demonstrated that it was reasonable for the applicant to anticipate the use of the site based on the director's assurance. *See id.*

18. In *Oakley*, the Commission found no factual basis was alleged to doubt the reliance of a former partner in the applicant on the representation of the real estate broker who believed that he could "handle the sale" of property he thought was available. 42 Rad. Reg. 2d (P&F) at 1498-99. In spite of the misplaced reliance that it perceived in the case, the Commission found no cause to doubt on the facts before it that the partner acted in good faith. *Id.* In contrast to *Gardner* and *Oakley*, the evidence of the dispute between SSE and Roberts Cellular raised a question as to whether the applicant could reasonably have relied on the assumption of his application preparer.

19. The Commission's rules and policies require that an applicant demonstrate a good faith belief of site availability. *See Celcom Communications of Georgia*, 52 Rad. Reg.2d (P&F) at 1681. However, the exercise of good faith rests on the applicant's accountability for the actions of its agent. The Commission has consistently held that applicants are responsible for the actions and advice of their agents and consultants.[20] Based on what the facts of this case clearly demonstrate,[21] we find that the applicant's twenty year relationship with Looney and asserted good faith reliance on him are insufficient to establish that Roberts Cellular had reasonable assurance of site availability at the time it filed its application.

2. Summary Dismissal by MSD

a. Pleadings

20. In addition, Roberts Cellular asserts that the MSD's summary dismissal of its the application as unacceptable for filing is inconsistent with prior Commission decisions. First, Roberts Cellular argues that the MSD dismissal cannot be reconciled with the Mass Media Bureau's refusal to dismiss as substantially incomplete an application even though the applicant had duplicated substantial portions of a competing applicant's engineering without consent. *Roanoke Christian Broadcasting, Inc.*, 47 R.R. 2d 1067 (Mass Med. Bur. 1980); *aff'd* 52 Rad. Reg. 2d (P&F) 1725 (Rev. Bd. 1983) (*Roanoke*). According to Roberts Cellular, the Bureau concluded that a court, not the Commission, is the proper forum to resolve a dispute over the copying of application material with respect to the private rights between the parties involved.[22] Roberts Cellular further asserts that the subsequent affirmance by the Review Board reflects Commission approval of that approach. Roberts Cellular asserts that the MSD decision departed from *Roanoke* without explanation and would undo the private contractual rights agreed to by Roberts and SSE.

21. McLang responds that there is no site availability issue raised in *Roanoke*, which dealt solely with the issue of substantial completeness. Also, McLang asserts, the *Roanoke* decision predates the Commission's requirement that cellular applicants must have reasonable assurance of site availability at the time they file an application. *See Part 22 Rewrite*, 95 FCC 2d 709 (1985). Moreover, contends McLang, the Commission refusal to act on allegations of purloined engineering material in a broadcast application is not applicable in the cellular context in which the Commission stated that it would scrutinize mass marketed cellular applications and reject those found to be "mere lottery tickets." *See Cellular Lottery Rulemaking*, 98 FCC 2d 175 (1984).

b. Discussion

22. Section 22.20(a) of the Commission's Rules states in pertinent part "that an application . . . will be unacceptable for filing . . . if (1) the application is defective with respect to completeness of answers . . .; or (2) the application does not comply with the Commission's rules,

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[18] *See supra*, para. 10 & note 16. The Pritchard declaration shows a misunderstanding of the Commission's reasonable assurance requirement. When an applicant relies on an engineering firm, that firm does not provide certifications of site availability, as the Pritchard declaration implies. *See id.* Rather, it is the applicant who certifies that it has the reasonable assurance that the engineering firm has obtained on its behalf. *See supra*, para. 13.

[19] Although the Commission recognized that cellular applicants in a lottery context might file mass-marketed, non-exclusive applications, the Commission stressed that an applicant must still file its own individual application and demonstrate that it has met the basic qualifications. *See Cellular Lottery Rulemaking*, 98 FCC 2d 175 (1984).

[20] *See, e.g ., Big Bay Broadcasting*, 4 FCC Rcd 4676, 4677 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 1294 (1990); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513, 5514 (Rev. Bd. 1987); *Bruce M. Schorsten*, 2 FCC Rcd 5421 (Com. Car. Bur. 1987).

[21] *See supra*, paras. 14-16.

[22] *See* Petition, p.15.

regulations, or . . . other requirements."[23] Thus, a cellular application is considered unacceptable if it contains all exhibits but is still found not to comply with specific Commission requirements.[24] *See Singleton v. FCC*, 70 Rad. Reg. 2d (P&F) 457, 458-59 (D.C. Cir. 1992); *Cellular Lottery Rules (Further Reconsideration)*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985). Because Roberts Cellular did not have reasonable assurance of site availability at the time it filed as required by Section 22.15(a) (1), it was in such non-compliance with Commission Rules, and therefore, was unacceptable for filing.[25]

B. Notice of Site Availability Issue and Due Process

1. Pleadings

23. Roberts Cellular contends that in its application it had a property interest that entitled it to due process before that interest could be summarily dismissed, *citing, e.g. Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973); *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964), *reh'g denied*, 330 F.2d 355 (5th Cir. 1964). Roberts Cellular contends that it was not accorded the minimal protections of due process because it was not afforded adequate notice of site availability as an issue. In addition, it argues that it was afforded neither an opportunity to present evidence in regard to arguments advanced for the first time in the MSD Order and to rebut opposing evidence, nor the right to have a decision based only upon evidence that is properly brought before the determining body with respect to its application. Roberts Cellular alleges that the MSD improperly relied on material from other proceedings to which Roberts was not a party. Roberts Cellular claims that it had no notice of the affidavit of an SSE Vice President referred to by the MSD from the Richland, Washington, MSA proceeding before the Commission.[26] This same affidavit, submits Roberts Cellular, was also filed in a civil proceeding concerning SSE and Monroe in which Roberts was not involved and which was unrelated to the Roberts Cellular application for the Steubenville MSA.[27]

24. Roberts Cellular further submits that in the SSE-Monroe civil proceeding a default judgment against Monroe was later vacated pursuant to a consent motion filed by SSE and Monroe after they reached a settlement, and thus, does not constitute undisputed evidence that is binding upon Roberts Cellular.[28] Roberts Cellular asserts that the facts supporting a default judgment may be challenged because the doctrine of collateral estoppel does not apply to a default judgment where there is no resolution on the merits.

25. McLang responds that Roberts Cellular had notice of the site availability issue from the public notices that the Commission issued regarding the investigation of the Crossville-related applicants.[29] Also, asserts McLang, the information from the affidavit of SSE's Vice President was corroborated by other evidence including written statements of Crossville-related applicants describing their relationship with SSE. McLang also asserts that the Commission never ruled that the Crossville-related applicants were precluded by the doctrine of collateral estoppel from challenging the MSD's findings.

2. Discussion

26. We disagree with Roberts Cellular that it did not have adequate notice that site availability could be an issue in processing its application. After a cellular lottery, Commission staff screens the winning application to determine whether it is complete and complies with Commission requirements. *See* 47 C.F.R. § 22.26(b). The Commission has stated that the public notice accepting applications for filing informs applicants that "strict scrutiny to ensure full compliance with the Commission's application requirements will follow in the event the application is selected in the lottery." *See Cellular Lottery Rules (Further Reconsideration)*, 59 Rad. Reg. 2d (P&F), at 410.[30] Consequently, after the lottery winning applicant becomes, as Roberts Cellular did, a tentative selectee, its application is subject to dismissal if the staff finds that it fails to comply with Commission Rules. *See Singleton v. FCC*, 70 Rad. Reg. 2d (P&F), at 458-59; *Cellular Lottery Rules (Further Reconsideration)*, 59 Rad. Reg. 2d (P&F), at 410. Pursuant to Section 22.26(b) of the Rules, the acceptance of an application for filing does not "preclude the subsequent return or dismissal of the application if it is [later] found to be defective." *See* 47 C.F.R. § 22.26(b). Thus, while the tentative selectee's application remains pending, it is on notice that it can be dismissed for any defect or non-compliance with the Rules that is found. Furthermore, certain defects cannot be cured by the applicant through amendment of its application; the lack of reasonable assurance of site availability is such a defect. *See Rem Communication*, 3 FCC Rcd 3705 (1988).

27. Further, we find upon reconsideration that the facts presented in this proceeding are sufficient and that it is not necessary to rely directly on the other Crossville-related proceedings to conclude that the Roberts Cellular applica-

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[23] *See* 47 C.F.R. § 22.20(a).

[24] We find that Roberts Cellular's reliance on *Roanoke* is misplaced. The *Roanoke* determination addressed whether a broadcast application complied with the "substantial completeness" standard for accepting applications in that service, even though it was alleged the engineering portions were taken from another competing proposal without consent. In contrast, we find that Roberts Cellular's application, although complete, was not in compliance with the Commission's Rules.

[25] Further, Roberts Cellular's contention that dismissal of its application would undo the private contractual rights agreed upon by Roberts and SSE is immaterial, because the parties' agreement was made after the filing of the application.

[26] *See Roberts Cellular, Inc.*, 5 FCC Rcd at 1362.

[27] *See id., citing* Civil Action No. 86-3342 (U.S.D.C.), filed Feb. 27, 1987, in which SSE sued Monroe for breach of contract regarding unauthorized distribution of its application materials, alleged in the affidavit.

[28] *See* Petition, Exhibit 3A, Order (vacating default judgment) (June 16, 1987); Exhibit 3B, "Consent Motion to Vacate Default Judgment," filed June 12, 1987 in Civil Action No. 86-3342 (U.S.D.C.), filed Feb. 27, 1987 and vacated on certain counts.

[29] *See supra*, para. 4. McLang also refers to Public Notice, Report No. CL-90-7 (released Oct. 5, 1989), announcing the filing of a pleading in the Jackson, Michigan, MSA. *See supra*, note 2.

[30] *See also Lottery Notice*, Mimeo 6559 (released Aug. 28, 1986) (announcing lists of applications initially accepted for filing in markets 181-200, and apprising that applications on the lists ". . . may, upon further examination, be returned as unacceptable for filing.").

tion was defective at the time that it was filed. In any event, Roberts Cellular has not demonstrated that the MSD did not base its dismissal of the application on the facts in the instant proceeding. Roberts Cellular's June 1987 response, which was reviewed by the MSD, reveals a dispute between SSE and the applicant regarding the use of SSE's engineering. That response also shows that the dispute was not resolved until several months after the filing of the application. It is also clear from the response that the applicant authorized Looney to settle the dispute after it had filed and had become a tentative selectee.

28. The evidence submitted by Roberts Cellular on reconsideration to rebut the MSD's findings does not contradict these facts. Moreover, the agreement between SSE and Roberts that was furnished in the pleadings here shows that the understanding with SSE as to the use of its engineering by the applicant was not reached until after filing.[31] The evidence from the other Crossville-related proceedings merely serves to corroborate (1) the fact of a dispute between SSE and the applicant here, and (2) the fact that the applicant's preparer, Looney, paid SSE to settle the dispute after the application was filed.[32] Therefore, we conclude that the allegation that Roberts Cellular was deprived of due process is without merit.

C. Request for Hearing

29. Roberts Cellular submits that under a "proper" legal analysis it had reasonable assurance that its proposed sites were available, and thus, no hearing is required. At the very least, Roberts Cellular contends, there are material questions of fact to be resolved on the site availability issue that mandate a hearing.

30. Pursuant to Section 309(d)(2) of the Communications Act,[33] the Commission must determine "on the basis of the application, the pleadings filed, or other matters which it may officially notice," whether a substantial and material question of fact is presented. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). Upon reconsideration, we find that the core facts of this case as to when the assurances of site availability were obtained and the lack thereof at the time of filing are, by Roberts Cellular's own admission, not in issue. Instead, Roberts Cellular has disputed the legal conclusions to be drawn from the facts. In this situation, a hearing is not required. *See Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). Thus, we conclude that because there is no substantial or material question of fact in this case, we need not designate the Roberts Cellular application for hearing.

D. Certification

31. In addition, Roberts Cellular asserts that the MSD's finding of a false certification attacks Roberts's personal integrity, and is unsupported by the evidence. Further, Roberts Cellular contends, the finding is improper, because, before it could be made, the MSD had to find that the applicant intended to deceive or make a misrepresentation to the Commission. Roberts Cellular asserts that there is no evidence of such intention here.

32. The Commission adopted a requirement that the applicant must certify in applications under Part 22 that it had reasonable assurance for the site. *Public Mobile Radio Services*, 95 FCC 2d 769, 778 (1983). This requirement includes cellular applications. *Id.* In the Roberts Cellular application, the item in the FCC Form 401 that it had reasonable assurance of site availability is checked. The applicant also signed the certification. Although, in fact, Roberts Cellular did not have reasonable site assurance, we do not have any reason to believe that it intended to deceive or make any false representation to the Commission.

IV. ORDERING CLAUSE

33. Accordingly, the dismissal by the Mobile Services Division of the application of Roberts Cellular, Inc., File No. 54792-CL-P-199-A-86, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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[31] *See supra*, note 12.
[32] The Pritchard Declaration submitted by Roberts Cellular also confirms that there was a dispute between SSE and Monroe. *See supra*, Petition, Exhibit 5, Pritchard Declaration.
[33] *See* 47 U.S.C. § 309(d)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PC Expanders NAL/Acct. No. 215BF0011
Amherst, New York

ORDER

Adopted: January 7, 1994; Released: January 18, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. PC Expanders, Inc. (Petitioner) has requested review of an action finding it liable for a $5,600 monetary forfeiture for violating Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, by marketing computer equipment without the required FCC authorization. For the reasons below, the forfeiture is affirmed.

II. BACKGROUND

2. On February 11, 1992, an FCC inspector entered Petitioner's business establishment and found that Petitioner was offering for sale computer equipment which lacked an FCC label or any label showing the make or model of the equipment. Petitioner was unable to produce any evidence indicating that the computer equipment had been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. § 15.101. On June 23, 1992, the Buffalo Office issued Petitioner a Notice of Apparent Violation (NAL) for $7,000. Petitioner, through counsel, responded by letter, dated July 22, 1992. In this response, Petitioner requested review of the amount of the proposed forfeiture, noting that "[s]ince this [NAL Petitioner] has proceeded to come into compliance and is ... awaiting a certification from the FCC...." Petitioner also argues that the determination of "willful violation" be changed because Petitioner "was not knowingly doing anything in violation of the FCC rules and regulation."

3. Based on Petitioner's response, the Buffalo Office issued a Forfeiture Order which reduced the forfeiture amount to $5,600, citing Petitioner's prior history of compliance.

III. DISCUSSION

4. First, Petitioner challenges the issuance of the Forfeiture Order as not complying with Section 503(b)(5) of the Act, 47 U.S.C. § 503(b)(5). Petitioner argues that the Forfeiture Order should not have been issued prior to affording Petitioner an opportunity for a personal interview. We disagree. Although Section 503(b)(5) does provide an opportunity for a personal interview, this provision is inapplicable to licensees or persons engaged in activities for which an authorization is required. Section 503(b)(5)(C) specifically states that "[t]he provisions of this paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required...." Petitioner was engaged in an activity, the marketing of a radio-frequency device, which requires a Commission issued authorization under Section 2.803 of the Commission's Rules and Section 302(b) of the Act.

5. Petitioner also contends that the forfeiture amount is excessive given that its business is only marginally profitable. Petitioner submitted tax returns for the past four years of the business' operation. The Commission is required by the Communications Act to take ability to pay into consideration in assessing forfeiture amounts. 47 C.F.R. § 503(b)(2)(D). We have considered the documentation submitted by Petitioner to support the assertion of financial inability to pay the $5,600 forfeiture imposed, and have determined that no further reduction appears justified.

6. Last, we address Petitioner's argument that the determination of "willful violation" is erroneous because Petitioner was not aware that the action of assembling and selling this type of equipment was prohibited by the Rules, and that Petitioner has since filed all required test data and has applied for FCC certification. The word "willfully" as used in Section 503(b) of the Act does not require a showing of wrongful intent, but only a showing that the action taken was intentional rather than accidental. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).[1] Petitioner's argument assumes otherwise, and is therefore unpersuasive. Similarly, Petitioner's remedial actions to correct a violation do not nullify a forfeiture penalty. *See Station KGLV, Inc.*, 42 FCC 2d 258, 259 (1973).

IV. CONCLUSIONS AND ORDERING CLAUSES

7. For the reasons cited above, we affirm the finding of liability in the amount of $5,600. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No other adjustments appear warranted. Accordingly, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, IT IS ORDERED that PC Expanders, Inc. forfeit to the United States the sum of five thousand six hundred dollars ($5,600) for willful violation of Section 302(b) of the Act and Section 2.803 of the Rules. 8. Accordingly, IT IS ORDERED, that Petitioner's request for reconsideration is DENIED pursuant to Section 1.106 of the Commission's Rules. 47 C.F.R. § 1.106.

[1] The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or [the Commission's Rules]. *See* H.R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

9. IT IS FURTHER ORDERED that PC Expanders shall, within thirty (30) days of release of this ORDER pay the amount of $5,600 by check or money order made payable to the Federal Communications Commission, "NAL/Acct. No. 215BF0011" and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that this Order shall be sent, by certified mail, return-receipt requested, to PC Expanders Inc., 3580 Sheridan Drive, Amherst, NY 14226, and one copy sent to Petitioner's counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-290

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Newton, New Jersey,
and Riverhead, New York,
in the New York, New York-
Linden-Paterson-Newark,
New Jersey, Television Market

ORDER

Adopted: January 3, 1994; Released: January 4, 1994

Reply Comment Date: January 18, 1994

By the Chief, Mass Media Bureau:

1. We now consider a Motion for Extension of Time for the filing of reply comments in the above-captioned proceeding filed on December 22, 1993, by WLIG-TV, Inc.("WLIG"), licensee of Television Station WLIG-TV, Riverhead, New York, and proponent of the amendment of Section 76.51 of the Rules to include Riverhead in the subject market. The deadline for filing comments in this proceeding was December 20, 1993, and reply comments are due January 4, 1994.

2. WLIG states that although comments were all filed on December 20, 1993, copies were not received by counsel until December 21 and 22. Seven sets of comments were filed. WLIG contends that the comments respond to a number of issues raised in the *Notice of Proposed Rule Making*,[1] which must be studied and addressed. Although WLIG has begun that process, it requests, noting the intervention of two Federal holidays, the press of other year-end responsibilities, and pre-existing vacation schedules, an additional nine business days, until January 18, 1994, to file its reply comments. Inasmuch as this proceeding was initiated, in part, by WLIG, it urges that the additional time will foster the paramount public interest in the development of a full public record for the Commission's decision.[2]

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time for filing comments in rule making proceedings shall not be routinely granted. However, we note that the *Notice of Proposed Rule Making* raises numerous issues concerning adjustments to particularly large and complex television markets, and therein we specifically state our desire for additional information to develop a comprehensive record before deciding these matters. Thus, it appears reasonable to provide the commenting parties additional time to analyze and address these issues. Therefore, we will extend the deadline for filing reply comments in this proceeding to January 18, 1994.

4. Accordingly, IT IS ORDERED, that the Motion for Extension of Time filed by WLIG-TV, Inc. IS GRANTED, and the time for filing reply comments in this proceeding IS EXTENDED to January 18, 1994.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] 8 FCC Rcd 8136 (1993).,

[2] WLIG states that counsel for Mountain Broadcasting Corporation, the other original petitioner in this proceeding, has indicated no objection to the requested extension. Further, counsel for those filing comments in this proceeding have indicated no objection to WLIG's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 2	Transmittal Nos. 3214 and 3388
AT&T Communications Tariff F.C.C. No. 2	Transmittal No. 3322
AT&T Communications Tariff F.C.C. No. 2	Transmittal No. 3682
AT&T Communications Tariff F.C.C. No. 2	Transmittal Nos. 3733 and 3811
AT&T Communications Tariff F.C.C. Nos. 2, 9 and 11	Transmittal Nos. 3804, 3990 and 4035
AT&T Communications Tariff F.C.C. No. 2	Transmittal No. 4093
AT&T Communications Tariff F.C.C. No. 2	Transmittal Nos. 4192 and 4239

Motion for Expedited Consideration of MCI Applications for Review of Bureau Orders Pertaining to Various Revisions to AT&T Tariff F.C.C. No. 2

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: January 19, 1994

By the Commission: Chairman Hundt not participating.

1. In 1991 and 1992, the Common Carrier Bureau released a number of tariff orders concerning AT&T 800 Service. Specifically, on September 27, 1991, the Common Carrier Bureau (Bureau) released an order denying petitions against AT&T Communications (AT&T) Transmittal Nos. 3214 and 3388,[1] and on October 25, 1991, released an order denying petitions against AT&T Transmittal No. 3322.[2] The Bureau released an order denying a petition against AT&T Transmittal Nos. 3733 and 3811 on February 14, 1992,[3] and on February 21, 1992, released an order denying a petition against AT&T Transmittal No. 3682.[4] On April 17 and 23, 1992, and May 7, 1992, the Bureau released orders denying petitions against AT&T Transmittal Nos. 3804,[5] 3990,[6] and 4035,[7] respectively. On May 28, 1992, the Bureau released an order denying a petition against AT&T Transmittal No. 4093.[8] Finally, in an order released June 30, 1992, the Bureau denied a petition against AT&T Transmittal No. 4192[9] and, in an order released July 14, 1992, the Bureau denied a petition against AT&T Transmittal No. 4239.[10] In all these orders, the Bureau permitted the transmittals at issue to become effective, stating that it had reviewed the transmittals and the related pleadings. The Bureau concluded that no compelling argument had been presented that the tariff transmittals were patently unlawful so as to require rejection, and that the transmittals did not warrant investigation at that time.

2. MCI Telecommunications Corporation (MCI) filed applications for review of these Bureau orders. In these applications, MCI claims that AT&T's various 800 Service term plans violate the Commission's *Interexchange Competition Order*,[11] the Bureau's *SDN/800 Bundling Order*,[12]

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[1] AT&T Communications, Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 3214 and 3388, 6 FCC Rcd 5677 (Com. Car. Bur. 1991)(*September 1991 Order*) (introduced 800 Customer Specific Bonus Plan, which provides discounts for customers which commit to three year term plans for various forms of 800 services).

[2] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal No. 3322, 6 FCC Rcd 6591 (Com. Car. Bur. 1991) (*October 1991 Order*) (introduced 800 Guaranteed Nodal Validator, which offers discounts to customers who commit to a three year term and a $5.5 million annual revenue commitment).

[3] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 3733 and 3811, 7 FCC Rcd 1783 (Com. Car. Bur. 1992) (*February 14, 1992 Order*) (Transmittal No. 3733 introduced the Global 800 Customer Pricing Plan, which provides discounts on international 800 service customers who commit to two-year service terms; Transmittal No. 3811 extended the length of the ordering window for that promotion).

[4] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal No. 3682, 7 FCC Rcd 1729 (Com. Car. Bur. 1992) (*February 21, 1992 Order*) (restructured AT&T's existing 800 Customer Specific Term Plan to expand the range of commitment levels available to customers, change the discount levels, and create separate discount schedules for Megacom 800).

[5] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal No. 3804, 7 FCC Rcd 3022, (Com. Car. Bur. 1992) (*April 17, 1992 Order*) (introduced AT&T Plus service, which gives 800 customers improved service performance and additional guarantees beyond those available with AT&T's existing services).

[6] AT&T Communications Revisions to Tariff F.C.C. Nos. 2, 9 and 11, Transmittal No. 3990, 7 FCC Rcd 2715 (Com. Car. Bur. 1992) (*April 23, 1992 Order*) (introduced a promotion of AT&T Guaranteed Nodal Validator Service which waives certain nonrecurring charges for customers who add a new routing arrangement during a specified time period).

[7] AT&T Communications Revisions to Tariff F.C.C. Nos. 2, 9 and 11, Transmittal No. 4035, 7 FCC Rcd 3315 (Com. Car. Bur. 1992) (*May 7, 1992 Order*) (introduced three AT&T 800 Customer Specific Term Plan II promotions for customers who subscribe within a specified time period).

[8] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal No. 4093, 7 FCC Rcd 3464 (Com. Car. Bur. 1992) (*May 28, 1992 Order*) (introduced a new promotional offering to customers who convert an existing AT&T 800 Service to an AT&T Megacom 800 Service within a certain time period).

[9] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 4192, 7 FCC Rcd 4354 (Com. Car. Bur. 1992) (*June 1992 Order*) (expanded the availability of a Megacom 800 services promotion originally filed under Transmittal 4093).

[10] AT&T Communications Revisions to Tariff F.C.C. No. 2, Transmittal Nos. 4239, 7 FCC Rcd 4652 (Com. Car. Bur. 1992) (*July 1992 Order*) (introduced a promotion of 800 Readyline Service and 800 Plan K Service).

[11] Competition in the Interstate Interexchange Marketplace,

and other Commission orders because the termination provisions in those plans allow AT&T to "lock-in" 800 number customers beyond the arrival of 800 number portability and thereby enable AT&T to unlawfully extend its dominance in that market. *See, e.g.,* MCI Application for Review of *September 1991 Order* at 2-7.

3. AT&T filed oppositions to each MCI application denying its 800 Service offerings are inconsistent with these orders or are otherwise unlawful. *See, e.g.,* AT&T Opposition to MCI Application for Review of *September 1991* at 3-8. For the reasons discussed below, we deny the above referenced applications for review.

4. As this Commission recently stated in denying an application for review associated with a Bell Atlantic Telephone Companies filing,[13] the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful: that is, the challenged filing does not on its face violate the Communications Act or our rules. Such a denial does not preclude a party from initiating a proceeding under Section 208 of the Communications Act, 47 U.S.C. § 208,[14] or the Commission from initiating a proceeding under Section 205 of the Act, 47 U.S.C. § 205,[15] to determine whether a tariff is unlawful. The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. As in the *1993 Bell Atlantic Order,* we find that the Bureau provided a sufficient basis for its decisions.

5. Finally, we have reviewed the substantive arguments MCI raises and affirm the Bureau's actions in denying MCI's petitions.[16]

6. MCI also filed a pleading captioned "Motion for Expedited Consideration" on July 13, 1992.[17] AT&T opposed that motion on July 28; MCI replied to AT&T's opposition on August 10. MCI argues that the Commission should act on its pending applications for review, either favorably or unfavorably, to give it a reasonable opportunity to pursue judicial remedies prior to the advent of 800 number portability.[18] In view of the action taken in this order, we deny MCI's motion.

7. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *September 1991 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

8. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *October 1991 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

9. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *February 14, 1992 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

10. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *February 21, 1992 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

11. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *April 17, 1992 Order, April 23, 1992 Order,* and *May 7, 1992 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

12. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *May 28, 1992 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

13. ACCORDINGLY, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 1992 Order* and *July 1992 Order,* filed by MCI Telecommunications Corporation, IS DENIED.

14. IT IS FURTHER ORDERED that MCI's Motion for Expedited Consideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part,* Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991) *further recon.,* Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992) (*Interexchange Competition Order).*

[12] AT&T Communications, 5 FCC Rcd 3833 (1990) (*SDN/800 Bundling Order).*

[13] Bell Atlantic Telephone Companies, 8 FCC Rcd 2732 (1993) (*1993 Bell Atlantic Order).*

[14] Under Section 208, a party may obtain appropriate equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission.

[15] Under Section 205(a) the Commission, after opportunity for hearing, upon complaint or on its own initiative, is authorized to prescribe just and reasonable charges, classifications, regulations and practices of carriers.

[16] In any event, the Bureau's action in this matter is consistent with a subsequent Commission decision reached in another context. *See* Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order, CC Docket No. 90-132, 8 FCC Rcd 5046, 5050 (1993).

[17] MCI's motion references the *September 1991 Order,* the *October 1991 Order,* the *February 14, 1992 Order,* the *February 21, 1992 Order,* the *April 17, 1992 Order,* the *April 23, 1992 Order* and the *May 7, 1992 Order* as pending when the motion was filed.

[18] In a separate action, the Commission extended the due date for 800 number portability until May 1, 1993. *See* Provision of Access for 800 Service, CC Docket No. 86-10, 7 FCC Rcd 8616 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. Nos. 1 and 2	Transmittal No. 1237
AT&T Communications Tariff F.C.C. No. 16	Transmittal No. 1445
AT&T Communications Revisions to Tariff F.C.C. No. 9	Transmittal No. 1690
AT&T Communications Revisions to Tariff F.C.C. No. 9	Transmittal No. 1740
AT&T Communications Tariff F.C.C. Nos. 1 and 2	Transmittal Nos. 1808, 1979 and 1991
AT&T Communications Tariff F.C.C. Nos. 2 and 11	Transmittal Nos. 1936 and 2136

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: January 19, 1994

By the Commission: Chairman Hundt not participating.

1. On September 12, 1988, the Common Carrier Bureau (the Bureau) released an order denying petitions against AT&T Communications (AT&T) Transmittal No. 1237,[1] and on February 28, 1989, the Bureau released an order denying petitions against AT&T Transmittal No. 1445.[2] On September 8, and September 29, 1989, the Bureau released orders denying petitions against AT&T Transmittal Nos. 1690,[3] and 1740,[4] respectively. In an order released December 29, 1989, the Bureau denied petitions against AT&T Transmittal Nos. 1808, 1979 and 1991,[5] and on March 2, 1990, took the same action with respect to AT&T Transmittal Nos. 1936 and 2136.[6] In all these orders, the Bureau permitted the transmittals at issue to become effective, stating that it had reviewed the transmittals and the related pleadings. The Bureau concluded that no compelling argument had been presented that the tariff transmittals were patently unlawful so as to require rejection, and that the transmittals did not warrant investigation at that time.

2. On September 29, 1988, MCI Telecommunications Corporation (MCI) filed an application for review of the *September 1988 Order*. AT&T opposed MCI's application for review. On March 30, 1989, MCI filed an application for review of the *February 1989 Order*, and AT&T opposed that application. On October 10, 1989, Communications Transmission, Inc. (CTI) filed an application for review of the *September 8, 1989 Order*, which AT&T opposed. On October 27, 1989, Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc. (Networks) filed an application for review of the *September 29, 1989 Order*.[7] Cable News Network (CNN) and the National Association of Broadcasters (NAB) filed applications for review of that order as well. AT&T filed its opposition to these applications for review. On January 29, 1990, Mid-Com Consultants, Inc. (Mid-Com), filed an application for review of the *December 1989 Order*, which AT&T opposed. Finally, on April 4, 1990, LiTel Telecommunications Corporation (LiTel) filed an application for review of the *March 1990 Order*, which AT&T opposed. For the reasons discussed below, we deny the above referenced applications for review.

3. All the applicants object that the Bureau's orders do not articulate the bases upon which the Bureau made its decisions.[8] They argue that the Bureau did not address their arguments in the orders.[9] MCI asserts that the Commission is obligated to explain why the Bureau's approach is "fair, reasonable, reasoned and in the public interest."[10] The Networks also claim that the Bureau should have applied the suspension standard in Section 1.773 of the Commis-

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[1] AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1237, 3 FCC Rcd 5718 (Com. Car. Bur. 1988)(*September 1988 Order)* (introducing the Multi-Location Calling Plan (MLCP), an optional pricing plan that provides discounts to customers of AT&T's outbound switched services).

[2] AT&T Communications Tariff F.C.C. No. 16, Transmittal No. 1445, 4 FCC Rcd 2331 (Com. Car. Bur.1989)(*February 1989 Order)* (introducing Tariff 16, "Competitively-Bid Governmental Services" -- a tariff limited to services provided to the government as a result of a competitive bidding process).

[3] AT&T Communications Tariff F.C.C. No. 9, Transmittal No. 1690, 4 FCC Rcd 6833 (Com. Car. Bur.1989)(*September 8, 1989 Order)* (revising rates for the following services: (1) Accunet T1.5 and T45 Services; (2) Dataphone Digital Service; and (3) Multiservice Volume Pricing Plan).

[4] AT&T Communications Tariff F.C.C. No. 9, Transmittal No. 1740, 4 FCC Rcd 7208 (Com. Car. Bur. 1989)(*September 29, 1989 Order)* (increasing rates for the television switch operation (TSO) option of Terrestrial Television Services).

[5] AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 1808, 1979 and 1991, 5 FCC Rcd 130 (Com. Car. Bur. 1989)(*December 1989 Order)* (revising tariffs for the AT&T Revenue Volume Pricing Plan and Customer Specific Term Plan, which allow AT&T to offer discounts in 800 service to high volume customers, and to "aggregators," who agree to buy large blocks of discounted 800 service for resale to low volume end users).

[6] AT&T Communications Tariff F.C.C. Nos. 2 and 11, Transmittal Nos. 1936 and 2136, 5 FCC Rcd 1350 (Com. Car. Bur. 1990)(*March 1990 Order)* (introducing a promotional offering for customers in Numbering Plan Areas (NPAs) in Michigan and Ohio who order T1.5 Local Channel service, Megacom service, and Megacom 800 service).

[7] On November 1, 1989, Hughes Television Network filed a statement in support of the Networks' application for review.

[8] While the application for review filed by CNN does not explicitly state these objections, it incorporates by reference the application for review filed by the Networks, which does object to the Bureau's explanation for its decision. *See* CNN Application for Review at 2; Networks Application for Review at 4-8.

[9] *See, e.g.*, MCI Application for Review (Transmittal 1237), filed Sept. 29, 1988, at 2-4; MCI Application for Review (Transmittal 1445), filed Mar. 30, 1989, at 3-5; CTI Application for Review (Transmittal 1690), at 4; LiTel Application for Review (Transmittals 1936, 2136), at 2; Mid-Com Application for Review (Transmittals 1808, 1979, and 1991), at 4-5.

[10] MCI Application for Review (Transmittal 1445), filed Mar. 30, 1989, at 5.

sion's Rules, 47 C.F.R. § 1.773, rather than a "patently unlawful" standard. Networks' Application at 14-15. *Accord* CNN Application at 2; Networks Reply at 1-2.

4. In its application for review of the *September 1988 Order* concerning revisions to AT&T's MLCP, MCI claims these tariff revisions raised significant questions regarding the application of the price cap net revenue test to the MLCP and asserts that AT&T's offering was unreasonably discriminatory, inadequately cost-supported, and failed to meet the net revenue test. MCI Application (Tr. 1237) at 5-6, 11-14; MCI Reply at 7-14. In its application for review of the *February 1989 Order*, MCI claims AT&T's Oahu Telephone System Outbound Calling Service is unreasonably discriminatory and not compensatory. MCI also contends that this AT&T offering should not have been allowed because it is not a "Government" offering under Section 201(b) of the Act, 47 U.S.C. § 201(b). MCI Application (Tr. 1445) at 7-10; MCI Reply at 7. In its application for review of the *September 8, 1989, Order*, CTI claims AT&T did not adequately support its below-band rates for certain Accunet services and that AT&T's rates were discriminatory. CTI Application (Tr. 1690) at 7-9, 11-12.

5. In their application for review of the *September 29, 1989, Order*, the Networks contend that AT&T's TSO tariff revisions should not have been permitted to take effect because they raised significant questions regarding the relevance of a price cap carrier's costs to significant increases in that carrier's rates. Networks' Application (Tr. 1740) at 3. The Networks also claim that these large rate increases were discriminatory, were not within price cap banding indexes, and were not cost-justified where necessary. Networks' Application (Tr. 1740) at 3-10. *Accord* NAB Application (Tr. 1740) at 4-5; CNN Application (Tr. 1740) at 2; Hughes Comments at 2-3; Networks' Reply at 2-4. The Networks also claim the Bureau should have addressed the relationship between these TSO rate increases and AT&T's Section 214 application to discontinue certain related television services. Networks' Application (Tr. 1740) at 14-15. *Accord*, CNN Application (Tr. 1740) at 2; Networks' Reply at 1-2.

6. Mid-Com urges review of the Bureau's *December 1989 Order* because, in Mid-Com's view, AT&T should not have been allowed to make mid-term changes to Mid-Com's 800 service plans without first demonstrating "substantial cause." Mid-Com Application (Tr. 1808) at 2-3. Mid-Com also objects that AT&T's tariff revisions were discriminatory. *Id.* at 4-9. In its application for review of the *March 1990 Order*, LiTel claims that AT&T's discounted Megacom service unlawfully discriminates in favor of customers in certain NPAs, that these discounts violate Commission policy regarding geographically averaged rates, and that they lack adequate cost support. LiTel Application (Tr. 1936) at 3-10. In AT&T's oppositions to these applications for review, AT&T denies that its service offerings are unlawful. *See, e.g.*, AT&T Opposition to CTI Application at 3-4.

7. As this Commission recently stated in denying an application for review associated with a Bell Atlantic Telephone Companies filing,[11] the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful: that is, the challenged filing does not on its face violate the Communications Act or our rules. Such a denial does not preclude a party from initiating a proceeding under Section 208 of the Communications Act, 47 U.S.C. § 208,[12] or the Commission from initiating a proceeding under Section 205 of the Act, 47 U.S.C. § 205,[13] to determine whether a tariff is unlawful. The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. As in the *1993 Bell Atlantic Order*, we find the Bureau provided a sufficient basis for its decisions.

8. Finally, we have reviewed the substantive arguments the applicants raise and affirm the Bureau's actions denying their petitions.

9. ACCORDINGLY, IT IS ORDERED that the applications for review of the Common Carrier Bureau's *September 1988 Order* and *February 1989 Order*, filed by MCI Telecommunications Corporation, ARE DENIED.

10. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *September 8, 1989 Order*, filed by Communications Transmission, Inc., IS DENIED.

11. IT IS FURTHER ORDERED that the applications for review of the Common Carrier Bureau's *September 29, 1989 Order*, filed by Cable News Network, Inc.; Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc.; and the National Association of Broadcasters, ARE DENIED.

12. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *December 1989 Order*, filed by Mid-Com Consultants, Inc., IS DENIED.

13. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *March 1990 Order*, LiTel Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[11] Bell Atlantic Telephone Companies, 8 FCC Rcd 2732 (1993) (*1993 Bell Atlantic Order*).

[12] Under Section 208, a party may obtain appropriate equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission.

[13] Under Section 205(a), the Commission, after opportunity for hearing, upon complaint or on its own initiative, is authorized to prescribe just and reasonable charges, classifications, regulations and practices of carriers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
US West Tariff F.C.C. No. 1	Transmittal Nos. 6 and 30
New York Telephone Company Tariff F.C.C. No. 41	Transmittal No. 909
Communications Satellite Corp. Tariff F.C.C. No. 103	Transmittal No. 723
New York Telephone Company Tariff F.C.C. No. 41	Transmittal Nos. 1035 and 1059
New England Telephone Company Tariff F.C.C. No. 40	Transmittal Nos. 1048 and 1071
Bell Atlantic Telephone Companies Tariff F.C.C. No. 1	Transmittal Nos. 359 375
Western Union Corporation Tariff F.C.C. Nos. 286, 287, 288, and 289	Transmittal No. 8740

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: January 19, 1994

By the Commission: Chairman Hundt not participating.

1. In September 1986, the Common Carrier Bureau (Bureau) released an order granting in part and denying in part petitions filed by Western Union Telegraph Company (WU Telegraph) and others against US West[1] Transmittal No. 6.[2] In that transmittal, US West sought increases and other changes in certain special and switched access rates for its Mountain Bell subsidiary. The *September 1986 Order* permitted that transmittal to become effective. WU Telegraph filed an application for review of the *September 1986 Order* in which it claimed that the Mountain Bell midcourse rate increases were not lawful because they were designed to recoup past earnings deficiencies. WU Telegraph Application at 1; *Accord* Ad Hoc Telecommunications Users Committee (Ad Hoc) Reply to Opposition at 4-5. US West denies that its rate adjustments are unlawful. US West Opposition at 2-4.

2. In May 1987, the Bureau released an order granting in part and denying in part petitions against US West Transmittal No. 30, filed by MCI Telecommunications Corporation (MCI) and others.[3] That US West transmittal introduced packet switched service with protocol conversion capabilities; the *May 1987 Order* permitted it to become effective. MCI filed an application for review of the *May 1987 Order* in which MCI claims US West unlawfully failed to include in its tariff switched access charges for this service notwithstanding customers' use of the local switched access network. MCI Application at 2-3. US West denies that its offering is inconsistent with the Commission's rules or otherwise unlawful. US West Opposition at 5-6.[4]

3. In August 1988, the Bureau released an order denying petitions against New York Telephone Company (NYT) Transmittal No. 909 filed by Teleport Communications – New York (Teleport-NY) and US Sprint Communications Company.[5] That transmittal introduced DS3/DS1 multiplexing as an optional feature offered on an individual case basis (ICB) with NYT's Superpath Optical 45 Mbps service. The *August 1988 Order* permitted the NYT transmittal to become effective. Teleport-NY filed an application for review of the *August 1988 Order*, claiming that NYT had improperly conditioned availability of the multiplexing feature on customer use of NYT's DS3 transmission service thereby hindering DS3 service competition. Teleport-NY Application at 4-5; Teleport-NY Reply at 3-4. NYT denies that its offering was unlawful. NYT Opposition at 3-4.[6]

4. In June 1989, the Bureau released an order denying a petition against Communications Satellite Corporation (Comsat) Transmittal No. 723 filed by Brightstar Commu-

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[1] US West includes the Mountain States Telephone and Telegraph Company (Mountain Bell), Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company.

[2] The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, Transmittal No. 6, Mimeo No. 7209 (Com. Car. Bur., released Sept. 30, 1986)(*September 1986 Order*).

[3] The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, Transmittal No. 30, 2 FCC Rcd 2730 (Com. Car. Bur. 1987)(*May 1987 Order*).

[4] On February 14, 1990, the Bureau initiated an inquiry into whether the Commission could find previously effective rates unlawful without conducting an investigation of those rates. Commission Seeks Comment on MCI Application, Public Notice, 5 FCC Rcd 1209 (Com. Car. Bur. 1990). Our denial of MCI's application for the reasons set out below renders moot that inquiry. Accordingly, we now terminate that inquiry.

[5] New York Telephone Company, Transmittal No. 909, 3 FCC Rcd 5389 (Com. Car. Bur. 1988) (*August 1988 Order*).

[6] We note that the Commission's policies regarding interconnection charges for special access services have changed substantially since this transmittal was permitted to take effect. *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order), recon.*, 8 FCC Rcd 127 (1992), *petns. for recon. pending,*

nications Ltd. (Brightstar).[7] That transmittal sought to amend a previously filed transmittal concerning certain Comsat video offerings. The *June 1989 Order* permitted the Comsat transmittal to become effective. Brightstar filed an application for review of the *June 1989 Order*. Brightstar claims that Comsat's promotional offering was predatory, discriminatory, anticompetitive, and contrary to both the 1962 Satellite Communications Act and the Commission's *Authorized User Policy Order*[8] because it lacked adequate cost support and because it entailed an end-to-end "retail" television service offering by a Comsat-managed carrier consortium on terms more favorable than those which Comsat makes available to its own "wholesale" commercial customers. Brightstar Application at 8-20. In addition, the application challenges the Bureau's refusal to grant Brightstar leave to respond to certain consortium issues raised in Comsat's reply but not directly addressed in Brightstar's earlier petition. *Id.* at 22-24. Comsat argues that its offering is lawful and that the Bureau properly dismissed Brightstar's "unauthorized pleadings." Comsat Opposition at 3-10.

5. Pan American Satellite filed a petition for reconsideration of the *June 1989 Order*, claiming that Comsat had eliminated an earlier preemption risk faced by customers but thereafter failed to increase its rates accordingly, as required by the *July 1989 Order*. Pan American Petition at 2-3.[9] In its reply, Comsat denies that its offering was inconsistent with the *June 1989 Order* or otherwise unlawful. Comsat Reply at 3-4. 6. In June 1990, the Bureau released an order denying petitions against NYT Transmittal No. 1035 and New England Telephone Company (NET) Transmittal No. 1048 filed by Teleport Communications Group (Teleport Group) and by Metropolitan Fiber Systems, Inc. (MFS). x[10] Those transmittals introduced rates and regulations for high capacity optical interface options for interstate customers of these carriers' existing DS3 service. The *June 1990 Order* permitted the NYT and NET transmittals to become effective. Teleport Group filed an application for review of the *June 1990 Order*, claiming the facilities offered under the NYT interstate tariff were unlawfully inferior to the facilities offered under its existing intrastate tariff but that rates for the interstate facilities were higher. Teleport Group Application at 4-7; Teleport Group Reply at 4; *Accord* MFS Comments at 1-3. In its opposition to the Teleport Group application, NYT denies that its transmittal was unlawful. NYT Opposition at 4-6.[11]

7. In July 1990, the Bureau released an order denying petitions against Bell Atlantic Telephone Companies (Bell Atlantic) Transmittal No. 359 filed by Institutional Communications Company (ICC) and others.[12] That transmittal introduced Federal Telecommunications Access Service for the use of interexchange carriers providing FTS 2000 service to the United States Government. The *July 1990 Order* permitted the Bell Atlantic transmittal to become effective. In its application for review of the *July 1990 Order*, ICC claims that Bell Atlantic's offering is unlawfully discriminatory and thereby demonstrates the need for Commission guidelines on LEC pricing of these interstate access services. ICC also contends that Bell Atlantic made "grossly erroneous" projections of potential competitive losses upon which the Bureau appeared to rely. ICC Application at 10-11, 19-21, 23-24. *Accord* Mid Atlantic Telecom, Inc., Comments at 2-4. In its opposition, Bell Atlantic denies that its transmittal was unlawful. Bell Atlantic Opposition at 2-3, 6-7.

8. In September 1990, the Bureau released an order denying a petition against Western Union Corporation (WU Corporation) Transmittal No. 8740 filed by TRT/FTC Communications, Inc. (TRT/FTC).[13] That transmittal provided for increases in the rates for termination of WU Corporation's telex and TWX traffic from other interconnected record carriers and for an increase in its TWX access rates. The *September 1990 Order* permitted the WU Corporation transmittal to become effective. TRT/FTC filed an application for review of the *September 1990 Order*, claiming these rate increases were discriminatory, were not cost-based, and were in violation of the Record Carrier Competition Act of 1981. TRT/FTC also contends that such large rate increases by a monopoly carrier are destroying the utility of the telex interconnection arrangements contemplated by the Commission in its CC Docket Nos. 78-97 and 82-1220. TRT/FTC Application at 1-2; TRT/FTC Reply at 2-3, 7-8. TRT/FTC also claims that WU Corporation's monopoly control over access to its subscribers' terminals irreparably harms TRT/FTC and other record carriers because, on many international messages, that control enables WU Corporation to collect an access rate from such carriers that actually exceeds the total division payments which these carriers collect from their foreign correspondents. *Id.* at 7. WU Corporation denies that its transmittal is unlawful. WU Corporation Opposition at 2-3.

9. In all these orders, the Bureau permitted the transmittals at issue to become effective, stating that it had reviewed the transmittals and the related pleadings. The Bureau concluded that no compelling argument had been presented that the tariff transmittals were patently unlawful so as to require rejection. In addition, with the limited exceptions of US West Transmittal Nos. 6 [14] and 30,[15] the Bureau

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appeal pending sub nom. Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992). *See also* NYNEX Telephone Companies, 7 FCC Rcd 8606 (Com. Car. Bur. 1992).

[7] Communications Satellite Corporation, Transmittal No. 723, 4 FCC Rcd 4987 (Com. Car. Bur. 1989) (*June 1989 Order).*

[8] Proposed Modification of the Commission's Authorized User Policy, CC Docket No. 80-170, 100 FCC 2d 177 (1985) (*Authorized User Policy Order).*

[9] Because Pan American Satellite's petition makes arguments similar to those raised in the Brightstar's application for review, we deny that petition for the reasons set forth in paragraph 11, *infra.*

[10] New York Telephone Company, Transmittal Nos. 1035 and 1059, and New England Telephone Company, Transmittal Nos. 1048 and 1071, 5 FCC Rcd 3682 (Com. Car. Bur. 1990) (*June 1990 Order).*

[11] We note that the Commission's policies regarding LEC provision of such special access facilities have changed substantially since this transmittal was permitted to take effect. *See Expanded Interconnection Order,* 7 FCC Rcd at 7405-7421 (paras. 69-109).

[12] Bell Atlantic Telephone Companies, Transmittal Nos. 359 and 375, 5 FCC Rcd 4141 (Com. Car. Bur. 1990) (*July 1990 Order).*

[13] Western Union Corporation, Transmittal No. 8740, 5 FCC Rcd 5918 (Com. Car. Bur. 1990) (*September 1990 Order).*

[14] The Bureau designated for investigation in CC Docket 85-166 the reasonableness of certain rate adjustment factors used by Mountain Bell. *September 1986 Order,* at p. 3. The Commission found unlawful certain special access rates of Mountain Bell in an order later vacated by the Sixth Circuit Court of Appeals. *See* Investigation of Special Access Tariffs of Local

further stated that the transmittals did not warrant investigation at that time. 10. In addition to the above challenges to the tariff revisions which these Bureau orders allowed to become effective, several of the applicants also object that these orders do not articulate the bases upon which the Bureau made its decisions, and that the Bureau did not in its orders address the arguments raised in the applicants' petitions.[16] The applicants argue that such questions should not be resolved in this manner by the Bureau.[17] For the reasons discussed below, we deny the above referenced applications for review.

11. As this Commission recently stated in denying an application for review associated with a Bell Atlantic Telephone Companies filing,[18] the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful: that is, the challenged filing does not on its face violate the Communications Act or our rules. Such a denial does not preclude a party from initiating a proceeding under Section 208 of the Communications Act, 47 U.S.C. § 208,[19] or the Commission from initiating a proceeding under Section 205 of the Act, 47 U.S.C. § 205.[20] to determine whether a tariff is unlawful. The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. As in the *1993 Bell Atlantic Order*, we find that the Bureau provided a sufficient basis for its decisions.

12. Finally, we have reviewed the substantive arguments raised by all of the above applicants and the petitioner for reconsideration and we affirm the Bureau's actions in granting in part the original petitions against the two US West transmittals and in denying the remainder of the petitions filed against the above tariffs.

13. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *September 1986 Order*, filed by Western Union Telegraph Company, IS DENIED.

14. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *May 1987 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

15. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *August 1988 Order*, filed by Teleport Communications –New York, IS DENIED.

16. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *June 1989 Order*, filed by Brightstar Communications Ltd., and the petition for reconsideration of that order, filed by Pan American Satellite, ARE DENIED.

17. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *June 1990 Order*, filed by Teleport Communications Group, IS DENIED.

18. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *July 1990 Order*, filed by Institutional Communications Company, IS DENIED.

19. IT IS FURTHER ORDERED that the application for review of the Common Carrier Bureau's *September 1990 Order*, filed by TRT/FTC Communications, Inc., IS DENIED.

20. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i) and 154(j), that the inquiry initiated February 14, 1990, in connection with the MCI Telecommunications Corporation Application for Review IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 412, 416 (1990), *vacated without remand*, Ohio Bell Telephone Co. v. FCC, 949 F.2d 864, 874 (6th Cir. 1991).

[15] The Bureau allowed Transmittal No. 30 to become effective subject to resolution in CC Docket No. 86-43 of certain issues common to both that docket and Transmittal No. 30. *See* New Jersey Bell Telephone Company, CC Docket No. 86-43, Memorandum Opinion and Order Designating Issues for Investigation, Mimeo No. 2381 (Com. Car. Bur., released Feb. 4, 1986). The Commission subsequently terminated that investigation in 1989, finding that it was no longer necessary or appropriate to seek to resolve the issues designated for investigation. New Jersey Bell Telephone Company, Transmittal No. 474, CC Docket No. 86-43, 4 FCC Rcd 5360 (1989), *recon. denied*, 5 FCC Rcd 304 (1990).

[16] *See e.g.*, Teleport-NY Application for Review at 6; Brightstar Application for Review at 21; ICC Application for Review at 6-7; TRT/FTC Application for Review at 2.

[17] *See e.g.*, ICC Application for Review at 6-7, 22.

[18] Bell Atlantic Telephone Companies, 8 FCC Rcd 2732 (1993) (*1993 Bell Atlantic Order*).

[19] Under Section 208, a party may obtain equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission.

[20] Under Section 205(a) the Commission, after opportunity for hearing, upon complaint or on its own initiative, is authorized to prescribe just and reasonable charges, classifications, regulations and practices of carriers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 2500, 2505, 2510, 2511, 2519, 2561, 2565, 2637, 2642, and 2674

Tariff F.C.C. No. 12

Applications for Review

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: January 19, 1994

By the Commission: Chairman Hundt not participating.

1. In November 1990, the Common Carrier Bureau released several orders denying petitions against various tariff transmittals filed by American Telephone and Telegraph Company (AT&T) for its Virtual Telecommunications Network Service (VTNS). These transmittals introduced VTNS options by which AT&T provided voice and data communications services among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.[1] In these orders, the Bureau said that it had reviewed the transmittals and the related pleadings and "concluded that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection."[2]

2. On November 14, 1990, US Sprint Communications Company Limited Partnership (Sprint) filed an application for review of three orders, DA 90-1638, DA 90-1639 and DA 90-1640, that permitted AT&T's VTNS Options 60 through 63 to become effective. On November 20, 1990, Sprint filed an application for review of the three other orders, DA 90-1679, DA 90-1680 and DA 90-1681, that permitted AT&T's VTNS Options 64 and 66 through 68 to become effective. On November 29, 1990, AT&T filed an opposition to Sprint's two applications for review. On December 7, 1990, MCI Telecommunications Corporation (MCI) also filed an application for review of the order, DA 90-1638, permitting Option 60 to become effective. On December 21, 1990, AT&T filed an opposition to MCI's application for review. For the reasons discussed below, we deny the applications for review filed by Sprint and MCI.

3. In its applications, Sprint claims the above AT&T VTNS option transmittals are unjustly discriminatory requiring that the Commission investigate these options. Sprint Applications at 1-3. In addition, Sprint asserts the Bureau lacked authority to condition the effectiveness of such transmittals on the outcome of the then pending CC Docket No. 87-568 proceeding and claimed that AT&T's cost support was deficient. Sprint Applications at 3.

4. In its application for review of one of these Bureau orders, MCI contends that AT&T VTNS Option 60 unlawfully bundles AT&T 800 service with other AT&T offerings. MCI Application at 2-4. AT&T filed oppositions to the Sprint and MCI applications denying that its VTNS offerings are unlawful. *See, e.g.*, AT&T Opposition to MCI at 3-4. For the reasons discussed below, we deny the above referenced applications for review.

5. As this Commission recently stated in denying an application for review associated with a Bell Atlantic Telephone Companies filing,[3] the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful: that is, the challenged filing does not on its face violate the Communications Act or our rules. Such a denial does not preclude a party from initiating a proceeding under Section 208 of the Communications Act, 47 U.S.C. § 208,[4] or the Commission from initiating a proceeding under Section 205 of the Act, 47 U.S.C. § 205,[5] to determine whether a tariff is unlawful. The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. As in the *1993 Bell Atlantic Order*, we find that the Bureau provided a sufficient basis for its decisions.

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[1] American Telephone and Telegraph Company, Transmittal No. 2500, Order, DA 90-1638, 5 FCC Rcd 6754 (Com. Car. Bur. 1990) (introduced VTNS Option 60); American Telephone and Telegraph Company, Transmittal Nos. 2505, 2637, and 2642, Order, DA 90-1639, 5 FCC Rcd 6747 (Com. Car. Bur. 1990) (introduced VTNS Option 61); American Telephone and Telegraph Company, Transmittal Nos. 2510, 2511, 2637, and 2642, Order, DA 90-1640, 5 FCC Rcd 6749 (Com. Car. Bur. 1990) (introduced VTNS Options 62 and 63); American Telephone and Telegraph Company, Transmittal Nos. 2561, 2565, and 2674, Order, DA 90-1679, 5 FCC Rcd 7040 (Com. Car. Bur. 1990) (introduced VTNS Options 66 and 67); American Telephone and Telegraph Company, Transmittal Nos. 2519, 2637, and 2642, Order, DA 90-1680, 5 FCC Rcd 7038 (Com. Car. Bur. 1990) (introduced VTNS Option 64); American Telephone and Telegraph Company, Transmittal Nos. 2576 and 2674, Order, DA 90-1681 5 FCC Rcd 7041 (Com. Car. Bur. 1990) (introduced VTNS Option 68).

[2] The Bureau also noted in these orders that while the transmittals did not present questions that warranted investigation at the time of the order, they could be affected by the Commission's decision in the CC Docket No. 87-568 remand proceeding. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). It therefore accepted the transmittals subject to the outcome of that proceeding. On October 24, 1991, the Commission concluded the remand proceeding, finding that VTNS Options 1 through 4, the only options subject to the remand, were lawful. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039 (1991) (*Tariff 12 Remand Order), petition for rev. den.*, Competitive Telecommunications Ass'n., *et al.* v. FCC, 998 F.2d 1058 (D.C. Cir. 1993).

[3] Bell Atlantic Telephone Companies, 8 FCC Rcd 2732 (1993) (*1993 Bell Atlantic Order).*

[4] Under Section 208, a party may obtain appropriate equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission.

[5] Under Section 205(a), the Commission, after opportunity for hearing, upon complaint or on its own initiative, is authorized to prescribe just and reasonable charges, classifications, regulations and practices of carriers.

6. Finally, we have reviewed the substantive arguments Sprint and MCI raise and affirm the Bureau's actions denying their petitions.[6]

7. Accordingly, IT IS ORDERED that the applications for review of the Common Carrier Bureau's November 1990 orders, DA 90-1638, DA 90-1639, DA 90-1640, DA 90-1679, DA 90-1680, and DA 90-1681, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] In any event, the Bureau's action in this matter is consistent with a subsequent Commission decision reached in another context. *See* Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2680-81 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 2 — Contract Tariff Transmittal Nos. 2 and 3

AT&T Communications Contract Tariff F.C.C. No. 3 — Contract Tariff Transmittal Nos. 7 and 8

AT&T Communications Contract Tariff F.C.C. No. 4 — Contract Tariff Transmittal Nos. 9 and 11

AT&T Communications Contract Tariff F.C.C. No. 5 — Contract Tariff Transmittal Nos. 10 and 12

AT&T Communications Contract Tariff F.C.C. No. 6 — Contract Tariff Transmittal Nos. 13 and 21

AT&T Communications Contract Tariff F.C.C. Nos. 7 and 8 — Contract Tariff Transmittal Nos. 16, 19, 20, 25 and 28

AT&T Communications Contract Tariff F.C.C. No. 9 — Contract Tariff Transmittal Nos. 22 and 27

AT&T Communications Contract Tariff F.C.C. No. 10 — Contract Tariff Transmittal Nos. 23 and 31

AT&T Communications Contract Tariff F.C.C. No. 11 — Contract Tariff Transmittal No. 26

AT&T Communications Contract Tariff F.C.C. No. 12 — Contract Tariff Transmittal No. 30

AT&T Communications Contract Tariff F.C.C. No. 13 — Contract Tariff Transmittal No. 36

AT&T Communications Contract Tariff F.C.C. No. 15 — Contract Tariff Transmittal No. 40

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: January 19, 1994

By the Commission: Chairman Hundt not participating.

1. In 1992, the Common Carrier Bureau (Bureau) released a number of orders concerning contract tariffs filed by American Telephone and Telegraph Company (AT&T).[1] Specifically, on February 25, 1992, the Bureau released an order denying a petition against AT&T Contract Tariff Transmittal Nos. 2 and 3,[2] and on March 12, 1992, released an order denying a petition against AT&T Contract Tariff Transmittal Nos. 7 and 8.[3] The Bureau released an order denying a petition against AT&T Contract Tariff Transmittal No. 9 on March 27, 1992,[4] and released an order denying petitions against AT&T Contract Tariff Transmittal No. 10 on April 9, 1992.[5] On May 22, 1992, the Bureau released an order denying petitions against AT&T Contract Tariff Transmittal Nos. 13 and 21[6] and, on June 10, 1992, released an order denying petitions against AT&T Contract Tariff Transmittal No. 22.[7] On June 11, 1992, the Bureau

[1] This Commission permitted AT&T to offer under tariff individually negotiated contracts only for services subject to further streamlined regulation (*i.e.*, business services). These contract tariffs must be made generally available to similarly situated customers under substantially similar circumstances. Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5896-97, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992) (*Interexchange Order*).

[2] AT&T Communications Contract Tariff F.C.C. No. 2, Contract Tariff Transmittal Nos. 2 and 3, 7 FCC Rcd. 1819 (1992) (*February 25, 1992 Order*), *Erratum*, 7 FCC Rcd. 2141 (1992) (provided Accunet T45 telecommunications service).

[3] AT&T Communications Contract Tariff F.C.C. No. 3, Contract Tariff Transmittal Nos. 7 and 8, 7 FCC Rcd. 1962 (1992) (*March 12, 1992 Order*) (provided AT&T Software Defined Network Service, AT&T Pro WATS Service, Accunet Spectrum of Digital Services, Accunet T1.5 Service, and Dataphone Digital Services).

[4] AT&T Communications Contract Tariff F.C.C. No. 4, Contract Tariff Transmittal No. 9, 7 FCC Rcd. 2243 (1992) (*March 27, 1992 Order*) (provided AT&T Megacom Service and AT&T MultiQuest Service).

[5] AT&T Communications Contract Tariff F.C.C. No. 5, Contract Tariff Transmittal No. 10, 7 FCC Rcd. 2603 (1992) (*April 9, 1992 Order*) (provided AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Voice Grade Local Channel Service, and Terrestrial 1.544 Mbps Local Channel Service).

[6] AT&T Communications Contract Tariff F.C.C. No. 6, Contract Tariff Transmittal Nos. 13 and 21, 7 FCC Rcd. 3463 (1992) (*May 22, 1992 Order*), *Erratum*, 7 FCC Rd. 3789 (1992) (provided AT&T Megacom service under a revised rate structure, for a term of five years).

[7] AT&T Communications Contract Tariff F.C.C. No. 9, Contract Tariff Transmittal No. 22, 7 FCC Rcd.4017 (1992) (*June 10, 1992 Order*) (provided AT&T Custom Software Defined Network International Service, AT&T Global Software Defined Network Service, Accunet Spectrum of Digital Service, and Local Channel Service).

released an order denying petitions against AT&T Contract Tariff Transmittal Nos. 16, 19, 20, and 25.[8] On June 15, 23, and 25, 1992, the Bureau released orders denying petitions against AT&T Contract Tariff Transmittal Nos. 23,[9] 26,[10] and 30,[11] respectively. Finally, in an order released on July 6, 1992, the Bureau denied petitions against AT&T Contract Tariff Transmittal No. 36[12] and, in an order released on July 15, 1992, the Bureau denied petitions against AT&T Contract Tariff Transmittal No. 40.[13] In all these orders, the Bureau permitted the transmittals at issue to become effective, stating it had reviewed the transmittals and the related pleadings. The Bureau concluded that no compelling argument had been presented that the tariff transmittals were patently unlawful so as to require rejection, and that the transmittals did not warrant investigation at that time.

2. MCI Telecommunications Corporation (MCI) filed four applications for review, each addressing a different group of these Bureau orders and each objecting to the denial of MCI's earlier petitions.[14] In each application, MCI claims these orders fail to include a brief statement of the grounds for denial in violation of the Administrative Procedures Act. 5 U.S.C. § 555(e). MCI further contends that by including unreasonably restrictive ordering provisions in these non-promotional offerings, AT&T ensures that, as a practical matter, only a few chosen customers will be able to subscribe contrary to AT&T's obligations to make such offerings generally available without discrimination under the *Interexchange Order* and the *Tariff 12 Order*.[15] *See, e.g.*, MCI Application for Review of *February 25, 1992 Order* at 5-6; MCI Reply at 3-5.

3. In its oppositions to the MCI applications, AT&T denies that these offerings are inconsistent with Commission orders or are otherwise unlawful. *See, e.g.*, AT&T Opposition to MCI Application for Review of *February 25, 1992 Order* at 2-6. For the reasons discussed below, we deny the above referenced applications for review.

4. As this Commission recently stated in denying an application for review associated with a Bell Atlantic Telephone Companies filing,[16] the denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful: that is, the challenged filing does not on its face violate the Communications Act or our rules. Such a denial does not preclude a party from initiating a proceeding under Section 208 of the Communications Act, 47 U.S.C. § 208,[17] or the Commission from initiating a proceeding under Section 205 of the Act, 47 U.S.C. § 205.[18] to determine whether a tariff is unlawful. The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. As in the *1993 Bell Atlantic Order*, we find that the Bureau provided a sufficient basis for its decisions.

5. Finally, we have reviewed the substantive arguments which MCI raises and affirm the Bureau's actions in denying MCI's petitions.

6. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *February 25, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

7. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *March 12, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

8. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *March 27, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

9. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *April 9, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

10. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *May 22, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

11. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 10, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

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[8] AT&T Communications Contract Tariff F.C.C. Nos. 7 and 8, Contract Tariff Transmittal Nos. 16, 19, 20, and 25, 7 FCC Rcd. 4050 (1992) (*June 11, 1992 Order*) (provided Accunet Spectrum of Digital Services and Local Service).

[9] AT&T Communications Contract Tariff F.C.C. No. 10, Contract Tariff Transmittal No. 23, 7 FCC Rcd. 4053 (1992) (*June 15, 1992 Order*) (provided AT&T Pro WATS Service).

[10] AT&T Communications Contract Tariff F.C.C. No. 11, Contract Tariff Transmittal No. 26, 7 FCC Rcd. 4352 (1992) (*June 23, 1992 Order*) (provided AT&T Software Defined Network Service).

[11] AT&T Communications Contract Tariff F.C.C. No. 12, Contract Tariff Transmittal No. 30, 7 FCC Rcd. 4353 (1992) (*June 25, 1992 Order*) (provided AT&T Software Defined Network Service and Accunet Service).

[12] AT&T Communications Contract Tariff F.C.C. No. 13, Contract Tariff Transmittal No. 36, 7 FCC Rcd. 4421 (1992) (*July 6, 1992 Order*) (provided AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, and Local Channel Service).

[13] AT&T Communications Contract Tariff F.C.C. No. 15, Contract Tariff Transmittal No. 40, 7 FCC Rcd. 4650 (1992) (*July 15, 1992 Order*) (provided AT&T Accunet Service).

[14] Comptel filed a petition to reject or, in the alternative, to suspend and investigate AT&T Contract Tariff Transmittal Nos. 2 and 3, Sprint filed petitions against a number of, and MCI filed petitions against all, the contract tariff transmittals at issue here.

[15] AT&T Communications, 4 FCC Rcd 4932 (1989), *recon . denied*, 4 FCC Rcd 7928 (1989), *vacated and remanded sub nom.*, MCI Telecommunications Corp. v. F.C.C., 917 F.2d 30 (D.C. Cir. 1990), *remand* AT&T Communications, 6 FCC Rcd 7039 (1991), *appeal pending*.

[16] Bell Atlantic Telephone Companies, 8 FCC Rcd 2732 (1993) (*1993 Bell Atlantic Order*).

[17] Under Section 208, a party may obtain appropriate equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission. MCI has filed a complaint with the Commission raising the same issues as those raised in the petitions filed against these contract tariffs. *See* MCI v. AT&T. File No. E-92-107 (filed Sept. 15, 1992).

[18] Under Section 205(a), the Commission, after opportunity for hearing, upon complaint or upon its own initiative, is authorized to prescribe just and reasonable charges, classifications, regulations and practices of carriers.

12. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 11, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

13. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 15, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

14. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 23, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

15. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *June 25, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

16. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *July 6, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

17. Accordingly, IT IS ORDERED that the application for review of the Common Carrier Bureau's *July 15, 1992 Order*, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION
d/b/a LCI INTERNATIONAL,
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

File No. E-92-121

ORDER

Adopted: January 6, 1994; Released: January 19, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1992, LiTel Telecommunications Corporation d/b/a LCI International (LiTel) filed the above-captioned complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking damages resulting from BellSouth's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On December 28, 1993, LiTel and BellSouth filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

REPORT AND ORDER

Adopted: December 22, 1993; Released: December 23, 1993

I. INTRODUCTION

1. On November 16, 1993, the Federal-State Joint Board adopted a recommended decision in CC Docket No. 80-286.[1] The *Interim Recommendation,* addressing the issues raised in our *Interim Notice*,[2] concludes that this Commission should adopt rules to moderate growth in the Universal Service Fund ("USF") during a two-year interim period, while a rulemaking proceeding on permanent USF changes is pending. The Joint Board recommended that the interim rules employ an indexed cap approach, whereunder the total USF in a given year would not be allowed to exceed a specified amount, increased by an index factor equal to the increase in total working loops for the previous year. For the reasons discussed in this report and order (*"Interim Order")* and in the Joint Board's *Interim Recommendation,* we adopt the recommendations of the Joint Board and the interim rules set forth in the Appendix to this *Interim Order.*

II. BACKGROUND

2. In the *Interim Notice,* we stated our intention to initiate a reevaluation of the current Part 36 rules governing high cost assistance and we referred the issue of possible changes in those rules to the Federal-State Joint Board in this proceeding.[3] At the same time, we proposed interim modifications of the USF assistance mechanisms and requested the Joint Board to prepare a recommended decision regarding those proposals.

3. In the *Interim Notice,* we observed that growth in the USF since its implementation in 1986 has been pronounced, increasing from $445 million to more than $700 million.[4] We expressed particular concern over the wide fluctuations in the rate of annual USF growth, which has ranged from approximately one percent to more than 19 percent.[5] We stated our desire to hold the USF to a moderate rate of growth while we and the Joint Board are in the process of studying and perhaps revising the current high cost mechanisms. For that reason, we proposed interim measures to moderate USF growth during the pendency of our proceeding to make permanent changes to the USF mechanisms. We indicated that interim rules would remain in effect for a maximum of two years and would not constitute prejudgment of the issues for purposes of the permanent rulemaking.

4. We proposed two primary alternatives for interim measures to moderate USF growth for the next two years. First, we proposed to index the threshold for receiving USF assistance to the rate of growth in the average cost per loop for non-price cap carriers. We stated our expectation that this method could be effective in moderating USF growth by preventing growth in the fund attributable primarily to a disparity between the growth in costs per loop for price cap and non-price cap carriers. Under the second alternative, maximum growth in the total USF would be indexed to the rate of growth in the total number of working loops in the nation. If the current rules would cause the USF to exceed the indexed cap, we proposed two means of adjusting USF assistance in order to ensure that the USF does not exceed the indexed cap.

5. The first means of implementing the indexed cap would involve adjusting each USF recipient's assistance by the same proportionate amount. The second means of implementation would require adjusting the threshold for receiving assistance in order to produce a total USF at the indexed cap level. We indicated that adjusting the threshold would actually be accomplished by adjusting the nationwide average cost per loop for purposes of determining USF assistance.[6]

6. We expressed our intention to implement interim measures that would not have a significant adverse impact upon the highest-cost carriers most in need of assistance. We requested comment upon the effect that each of the proposed alternatives would have on recipients of high cost assistance. We also invited comment upon the effectiveness of the alternatives in moderating USF growth during the two-year interim period.

7. Comments were filed on October 6, 1993, and reply comments were submitted on October 18, 1993.[7] On November 16, 1993, the Joint Board met in New York City

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[1] "Recommended Decision," Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 93J-3 (released December 10, 1993) (*"Interim Recommendation").*

[2] "Notice of Proposed Rulemaking," Amendment of Part 36 and Establishment of a Joint Board, 8 FCCRcd 7114 (1993) (*"Interim Notice")* .

[3] *See* the *Interim Notice,* and decisions cited therein, for a brief history of the Part 36 high cost assistance measures.

[4] We cited data submitted by the National Exchange Carrier Association ("NECA") in CC Docket No. 93-123 (filed July 21, 1993) indicating that the total level of payments into the USF during 1993 will be approximately $741 million.

[5] *Interim Notice* at ¶13 and n.16. As we explained, our calculation of the USF annual amounts and growth rates were based upon the data for projected USF payments at full transition.

[6] *See* discussion in *Interim Notice* at ¶ ¶ 22-25.

[7] A number of late-filed comments and reply comments were submitted in this proceeding and are cited by the Joint Board in its decision. Because those comments essentially concur in comments submitted on a timely basis by other parties, we believe that all parties had adequate opportunity to respond to the arguments presented. We therefore have included the late-filed comments and reply comments in the record of this proceeding.

and adopted its recommendations regarding interim measures. The Joint Board recommended that we adopt rules to implement an indexed cap to moderate USF growth, adjusting the threshold for receiving assistance if the current rules would cause the total USF to exceed the indexed cap. The *Interim Recommendation* was released on December 10, 1993.

III. SUMMARY OF JOINT BOARD'S INTERIM RECOMMENDATION

8. In its *Interim Recommendation*, the Joint Board found that concern regarding the reasonableness of the overall rate of increase in the USF is well-founded. The Joint Board rejected suggestions that the burden on interstate telecommunications should be evaluated in terms of the USF cost per minute of interstate toll usage, explaining that the loop costs on which USF assistance is based are not generally usage sensitive. In addition, the Joint Board disagreed with some commenters' argument that the Joint Board's determination in 1984 not to recommend a $1 billion cap established that the current size of the USF, and hence the rate of increase to date, is reasonable. The Joint Board explained that reluctance to set an absolute cap on the USF bears little or no relation to the reasonableness of the rate of growth over a particular time period. Further, the Joint Board noted that circumstances, including the transition away from rate of return regulation for the largest local exchange carriers ("LECs"), have changed significantly since implementation of the USF nearly eight years ago.

9. The Joint Board determined that USF growth has been erratic and found unconvincing the explanations tendered by commenters for the wide fluctuations in annual growth. The Joint Board stated its belief that a sudden, large-scale increase in the USF during the pendency of our permanent USF rulemaking would significantly impede efforts to reevaluate the high cost assistance rules and, if necessary, revise them. The Joint Board explained that in the past, changes in jurisdictional separations methodologies frequently have involved lengthy transition periods to ameliorate shifts in jurisdictional cost allocations. If the USF were to increase significantly during the next two years, while a permanent USF rulemaking is in progress, the transition process would be rendered more difficult, particularly if any LECs whose assistance increased pronouncedly during tht interim period were to receive less assistance under the new permanent rules. The Joint Board reasoned that some moderate USF growth while the permanent rulemaking is in progress will ensure adequate support for the highest cost LEC study areas while, at the same time, protecting against sudden large increases in the fund that could make retargeting or restructuring of the USF assistance mechanisms more difficult.

10. The Joint Board rejected the indexed threshold proposal, which would involve determining each year's nationwide average cost per loop by indexing the prior year's average cost per loop to the rate of growth in the average cost per loop for all non-price cap carriers. The Joint Board found that the indexed threshold presented no degree of certainty regarding the total USF level and, in addition, had the potential for significant volatility because it excluded price cap carriers, which provide the predominant portion of subscriber loops nationwide, from calculation of the proposed index.

11. The Joint Board recommended, instead, the use of an indexed cap, which affords a greater degree of certainty in the total USF size. The Joint Board determined that indexing growth in the USF to growth in the total number of working loops would produce stable, moderate USF growth during the two-year interim period while still preserving adequate assistance for the recipients most in need of assistance. The Joint Board decided that several alternatives proposed in the comments were not suitable as interim index factors. For example, the proposal to index the size of the USF to growth in interstate toll minutes of use was found to be inconsistent with the fact that USF loop costs are not generally traffic sensitive. In addition, the Joint Board indicated that the proposals of the Florida and Illinois commissions, designed to address undue fluctuations in USF revenues on a study area-specific basis and to reduce possible uneconomic incentives, raised broad issues more appropriately addressed in the long-term, permanent USF rulemaking. The Joint Board therefore did not recommend that the Commission adopt those alternative index factors for the two-year interim period.[8]

12. The Joint Board recommended that the indexed cap should be implemented by adjusting the threshold for receiving assistance to ensure that the total USF does not exceed the indexed cap amount.[9] The Joint Board determined that the differences between 1994 assistance per loop under the current rules and under the recommended alternative would be very small and should have no potential to affect adversely the continued availability of local telephone service at reasonable rates. In contrast, another option under consideration, involving proportionate reduction of all recipients' assistance levels, was judged inadvisable because it would impose the largest decreases upon the highest cost study areas most in need of assistance. The Joint Board also rejected a proposal to adjust each recipient's assistance by the same dollar amount per loop. The Joint Board explained that such a method would have an unfairly large effect upon large study areas, because large study areas receive a smaller percentage of USF assistance per loop than small study areas at the same cost level.[10]

13. Addressing procedural issues raised in the comments, the Joint Board rejected the argument that interested parties were not afforded adequate opportunity to comment upon the proposed interim measures. The Joint Board noted that numerous comments, many of them lengthy, were submitted by parties representing a wide variety of viewpoints and interests. In addition, the Joint Board explained, the proposed measures would not be permanent and would not prejudge the issues for purposes of the permanent rulemaking.[11] The Joint Board also rejected the argument that limiting USF growth for two years would amount to retroactive ratemaking because the recovery of

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[8] *Interim Recommendation* at ¶ ¶ 44-45.

[9] *See* discussion of this methodology, *supra* at ¶ ¶ 4-5 and in the *Interim Notice* at ¶ ¶ 22-25.

[10] *Interim Recommendation* at ¶ 50.

[11] *Id.* at ¶ ¶ 57-61.

USF costs has a built-in lag of two years. The Joint Board pointed out that the interim measures would not change the USF rates paid by interstate interexchange carriers during prior periods, nor would USF recipients be precluded from recovering all of their loop costs through current or future rates.[12]

IV. DISCUSSION

14. In its *Interim Recommendation*, the Joint Board carefully considered the effects of any interim USF changes upon recipients of high cost assistance. Throughout that decision, the Joint Board stated its desire to maintain adequate USF support for high cost LECs, particularly those highest-cost LEC study areas most in need of assistance, during the pendency of the rulemaking on permanent USF changes. We are in full accord with that goal. Universal availability of telephone service at reasonable rates continues to be an important policy for us as well as for the Joint Board.

15. At the same time, as the Joint Board observed, numerous regulatory, technological, and market changes in the telecommunications industry strongly suggest that a fresh look at the goals and effects of the USF high cost assistance mechanisms would serve the public interest.[13] Moreover, the conclusion of the eight-year USF transition period further warrants reevaluation of the existing USF rules.

16. It is unfortunate that some commenters in this proceeding appear to have interpreted the *Interim Notice* as a sign that we have lessened our commitment to universal service goals, for that is most assuredly not the case. On the contrary, our intention to proceed with a permanent rulemaking on USF support reflects our desire to ensure that our rules provide assistance fairly, effectively, efficiently, and in a manner consistent with technological and competitive advancements within the telecommunications industry. As we undertake this evaluation of our support mechanisms, we cannot foreclose the possibility of revisions that may retarget assistance, resulting in some carriers or subscribers receiving more assistance and others receiving less.

17. We therefore agree with the Joint Board's determination that it would be prudent to implement interim measures to moderate USF growth during the pendency of the permanent USF rulemaking. As the Joint Board aptly observed, past efforts to revise jurisdictional separations procedures have involved lengthy transition periods to ease carriers' adjustment to potential jurisdictional shifts caused by the separations changes. These transition periods have significantly delayed full implementation of new methodologies. Because we shall soon initiate a rulemaking to evaluate the current high cost assistance mechanisms and, perhaps, to revise those procedures, it is sensible to adopt interim rules to prevent large increases in the USF during the pendency of the permanent rulemaking.

18. We believe that these interim measures should reduce difficulties that might otherwise be experienced in implementing new permanent assistance mechanisms on a timely basis. This prophylactic approach is particularly appropriate because, in the past, the USF has manifested an erratic pattern of growth. The Joint Board correctly observed that the comments provided no real basis for assurance that another sudden increase in the USF will not occur within the next two years. Indeed, explanations proffered by commenters for sudden surges of the USF level in the past are notably speculative and unconvincing.[14] We therefore agree with the Joint Board that measures to moderate USF growth would facilitate our ability to revise the USF mechanisms, if necessary, without jeopardizing the continued availability of local telephone service at reasonable rates.

19. We also concur in the Joint Board's finding that the indexed cap represents an effective means of moderating USF growth during the interim period. The Joint Board explained that the indexed cap approach affords a degree of certainty regarding the total level of the USF that is lacking in the proposal to index the threshold for USF assistance to the rate of growth in non-price cap carrier costs per loop. That certainty is important, because ensuring moderate USF growth is the very rationale for adopting interim measures.

20. Using the rate of growth in the total number of loops nationwide as an index factor will ensure a stable, moderate rate of growth during the interim period.[15] Although the adoption of an absolute cap (or "freeze") pending further rulemaking has precedent in this proceeding,[16] we do not believe that a freeze is essential to accomplish our goal of preventing sudden, pronounced increases in the USF during the interim period. Allowing a moderate rate of growth in the USF is sufficient to avoid impedence of the permanent rulemaking, and subsequent implementation of its conclusions. At the same time, allowing some USF growth represents an attempt to accommodate the concerns of commenters who argue that additional funds are needed for carriers that plan to replace facilities in the short-term or that may expand service to additional customers. The rate of growth in total loops is a suitable index factor, not only because it has a demonstrated history of stable, moderate growth, but also because it reflects expansion in the subscriber base of the nationwide network. Using the rate of growth in the total number of loops as the index factor for the USF cap will accomplish our goal of avoiding pronounced USF growth during the two-year interim period while continuing to ensure the availability of basic local telephone service at reasonable rates.

21. Contrary to the contentions of some commenters, the Joint Board's determination, some years ago, not to recommend a cap on the total USF should not preclude a different conclusion under the present circumstances. As AT&T explained, and the Joint Board reiterated in its *Interim Recommendation*, regulatory changes such as the freezing of study area boundaries and the initiation of price cap incentive regulation for the interstate rates of most large LECs bear on the issue of what constitutes a reasonable USF level.[17] Moreover, it is important to recall that neither the Joint Board nor this Commission ever determined that $1 billion would constitute a reasonable USF

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[12] *Id.* at ¶ 63.

[13] *See Interim Recommendation* at ¶ ¶ 10-11.M

[14] *See* discussion in the *Interim Recommendation* at ¶ ¶ 21 and 25, and citations to the record contained therein.

[15] As we explained in the *Interim Notice*, data submitted on the public record annually by NECA indicate growth in the total number of loops ranging from two to 3.6 percent from 1984 to 1991, the most recent year for which data are available.

[16] *See* n.53 in the *Interim Recommendation*.

[17] *Interim Recommendation* at ¶ ¶ 17-19.

total for a particular point in time. During the first year of the USF transition, the fully phased-in USF amount would have been only $445 million, and only one-eighth of that amount was reflected in interstate rates. Thus, consideration of a USF cap may not have been of primary importance in 1984, prior to the beginning of USF implementation and before there was any basis for evaluating the reasonableness of USF growth.

22. Circumstances have changed considerably since initial consideration of the USF high cost mechanisms. During the past eight years, the USF has grown by approximately 60 percent, with annual rates of growth ranging from one percent to more than 19 percent. In light of our experience with the USF since initial consideration of the issues in 1984, the changed regulatory environment and other circumstances, and our desire to prevent excessive USF growth during the pendency of the permanent USF rulemaking, we believe that the Joint Board's recommendation for an indexed USF cap should be adopted.

23. We also concur in the Joint Board's recommendation that the indexed cap should be implemented by adjusting the threshold for receiving USF assistance. The Joint Board pointed out that the effects of this means of implementation upon recipient carriers during 1994 would be extremely small, and found that it has no potential to diminish the continued availability of local telephone service at reasonable rates.[18] We agree. Changes of this magnitude would have a *de minimis* effect, and even somewhat larger changes should not cause significant harm. Moreover, if circumstances change, the Joint Board encouraged recipients who would experience a significant adverse impact per loop per month to submit waiver requests, and we support that means of addressing any unforeseeable problems that may occur during the interim period.

24. We agree with and adopt as our own the Joint Board's analysis of the procedural issues, specifically the adequacy of the opportunity for comment and the retroactive ratemaking issue, raised in the comments. We likewise adopt the Joint Board's conclusion that the determinations of the *Interim Recommendation* and the *Interim Order* should not prejudge the issues for purposes of the permanent USF rulemaking. Finally, we concur with the Joint Board's position that, should the permanent USF rulemaking conclude sooner than expected, the new rules should replace the interim rules as soon as practicable. In sum, we adopt the recommendations of the Joint Board in its *Interim Recommendation*, as well as the Joint Board's reasoning in support of those recommendations.

25. We indicated in the *Interim Notice* our intention to put interim rules into effect on January 1, 1994, explaining that new USF tariffs generally go into effect at the beginning of each year. Because the recommended indexed cap approach which we are adopting requires the calcuation of USF totals and index factors on a calendar year basis, there is additional reason to implement the interim rules at the beginning of the year. Accordingly, we find good cause for making the rule amendments effective on less than 30 days notice[19] and shall require that the interim rules become effective on January 1, 1994.

V. ORDERING CLAUSES

26. Accordingly, pursuant to Sections 1, 4(i), 221(c), and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 221(c), and 410(c), IT IS HEREBY ORDERED that Part 36 of the Commission's Rules and Regulations, 47 C.F.R., Part 36, Subpart F - Universal Service Fund, is amended as shown in the Appendix to this report and order, effective January 1, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

PART 36 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 36 - JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES.

1. The authority citation for Part 36 continues to read as follows:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. Section 36.601 is amended by adding a new paragraph (c) to read as follows:

§ 36.601 General.

* * * * *

(c) During an interim period commencing on January 1, 1994, and terminating on January 1, 1996, the annual amount of the total Universal Service Fund shall not exceed the amount of the total Universal Service Fund for the immediately preceding calendar year, increased by a rate equal to the rate of increase

[18] *See* discussion in the *Interim Recommendation* at ¶ 52 and in n.104, citing NECA's projection that for 1994 the approximate maximum difference between USF assistance under the current rules and under the indexed cap approach recommended by the Joint Board should be 18 cents per loop per month. Those calculations were based on a 1993 total that did not include prior period adjustments nor administrative costs. For that reason, and because the derivation of the USF under our Part 36 rules does not, strictly speaking, include costs other than current period expense adjustments, we have decided to exclude prior period adjustments and administrative costs from the indexed USF cap. *Compare Interim Recommendation* at n.105. We emphasize, however, that we shall carefully monitor any changes in those excluded costs during the interim period, in order to ensure that the purpose underlying adoption of the indexed cap is not undermined.

[19] *See* 5 U.S.C. §553(d)(3).

in the total number of working loops during the calendar year preceding the June filing. The total Universal Service Fund shall consist of the Universal Service expense adjustments, including amounts calculated pursuant to §§36.612(a) and 36.631. The rate of increase in total working loops shall be based upon the difference between the number of total working loops on December 31 of the year preceding the June filing and the number of total working loops on December 31 of the second year preceding that filing, both calculated pursuant to §36.611(a)(8).

3. Section 36.622 is amended by revising the first sentence of paragraph (a) and by adding a new paragraph (c) to read as follows:

§ 36.622 National and study area average unseparated loop costs.

(a) National Average Unseparated Loop Cost per Working Loop. Except as provided in paragraph (c) of this section, this is equal to the sum of the Loop Costs for each study area in the country as calculated pursuant to §36.621(a) divided by the sum of the working loops reported in §36.611(a)(8) for each study area in the country. * * *

* * * * *

(c) During an interim period commencing on January 1, 1994, and terminating on January 1, 1996, the National Average Unseparated Loop Cost per Working Loop shall be the greater of:

(1) The amount calculated pursuant to the method described in paragraph (a) of this section; or

(2) An amount calculated to produce the maximum total Universal Service Fund allowable pursuant to §36.601(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the

800 Service Management System Tariff

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

ORDER

Adopted: January 3, 1994; Released: January 4, 1994

By the Chief, Tariff Division, Common Carrier Bureau

1. On July 19, 1993 the Bureau released an Order,[1] designating issues in our investigation of the 800 data base access tariffs. That order set deadlines by which oppositions to the local exchange carriers' (LECs) direct cases had to be filed. On August 5, October 18 and November 30, 1993, the Tariff Division released orders, each of which extended the time for filing pleadings responding to the LECs' direct cases. Currently, replies are due on January 5, 1994 and rebuttals are due on January 20, 1994. On December 28, 1993, the Ad Hoc Telecommunications Users Committee (petitioner) filed a motion to extend the time, until March 15, 1993 (sic), to file its pleadings responding to the LEC direct cases.

2. Several LECs have filed petitions for waiver of the cost disclosure requirements of paragraph 29 of the *Designation Order*.[2] Petitioners contend that this extension is necessary to allow the LECs to file, and the commenters to comment on, revised cost support if the Commission denies the LEC petitions for waiver.

3. The Division has reviewed petitioners' request for extension of time and has determined that good cause has been shown to grant an extension to all parties. Therefore, pleadings responding to the direct cases will now be due on February 15, 1994. Rebuttals to oppositions or comments will be due on February 28, 1994.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by Ad Hoc Telecommunications Users Committee IS GRANTED, to extend the deadlines for all parties in this proceeding to file pleadings responding to direct cases, and replies, as specified in paragraph 3 of this Order.

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[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, 8 FCC Rcd 5132 (1993) (*Designation Order*).

[2] *See also Public Notice, Participating Bell Operating Companies, US West and GTE Request Waivers of Requirement to Disclose Cost Support*, CC Docket 93-129, 8 FCC Rcd 7328 (1993) (established pleading cycle for comments on LEC petitions for waiver of cost disclosure requirements in this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Cablevision	CSR-3892-M MOO405

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1993; Released: January 18, 1994

By the Chief, Mass Media Bureau:

1. On July 1, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Channel 6), Sedalia, Missouri, was filed with the Commission claiming that Cablevision, operator of a cable television system serving Brunswick, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend located at north latitude 39°26'00" and west longitude 93°08'00" and it is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385. 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Cablevision to carry its signal, but also that it order the system to carry it on channel 6, the channel on which the station broadcasts over-the-air.

2. Although no formal opposition was filed, in a letter dated April 30, 1993, to KMOS-TV, Cablevision maintained that the station's signal strength at Cablevision's headend was not sufficient to entitle it to mandatory carriage on Cablevision's system serving Brunswick.

3. Cablevision's letter dated April 30, 1993, to KMOS-TV concerning its signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. The 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, however, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[1] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[2] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of the calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Cablevision is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable system's principal headend.

4. Since Cablevision filed no further pleadings in the above proceeding, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, and Cablevision IS ORDERED, to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Brunswick, Missouri, forty-five (45) days from the release date of this *ORDER* unless Cablevision submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] Generally, if the test results for UHF stations are less than -51 dBm we believe that a least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.

[2] *See* § 76.61 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Friendship Cable of Missouri — CSR-3954-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1993; Released: January 18, 1994

By the Chief, Mass Media Bureau

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Friendship Cable of Missouri ("Friendship"), operator of a cable television system serving Roach, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Roach[1] and is therefore a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Friendship to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air.

2. On August 5, 1993, Friendship filed an opposition to this complaint, in which it acknowledges that KMOS-TV meets the 1992 Cable Act's tests as a qualified NCE station, because the system is on the edge of KMOS-TV's Grade B contour and located within 50 miles of Sedalia. However, Friendship contends that KMOS-TV failed to deliver a good quality signal to its headend. It argues, therefore, that it is not required to carry KMOS-TV's signal, pursuant to Section 615(g)(4) of the 1992 Cable Act. In support of its contention, Friendship submits a statement by its field service engineer, Bob Green, that indicates that KMOS-TV delivers an off-air signal to Friendship's headend processing equipment at Roach that is -8dBm. Accordingly, Friendship asserts that KMOS-TV does not qualify for carriage on its system serving Roach, and that its request for carriage should be dismissed.

3. On September 7, 1993, KMOS-TV filed a response to Friendship's opposition to its complaint. In its response, KMOS-TV states that as of September 1, 1993, it has failed to receive a response from Friendship regarding its request of June 3, 1993, to be furnished with information regarding its geographical coordinates and the off-air broadcast stations carried upon its system serving Roach. In the absence of this information, KMOS-TV states that it has attempted to analyse the data submitted by Friendship and feels that the field survey analysis survey it submitted is, at best, incomplete. Further, KMOS-TV argues that Friendship has not shown that it conducted the field analyis tests in accordance with the practices that the cable system uses to receive and process other off-air stations which are currently being carried. KMOS-TV states that it is probable that different engineering practices were used to test and process the reception level of its signal, noting that the antenna was put on a forty-foot tower and that the field survey was not dated and did not indicate the orientation of the reception antenna for KMOS-TV's signal, and that there were no periodic measurements of the signal.

4. Friendship's objection concerning KMOS-TV's signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. Although the 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, it did adopt a standard for determining the availabilty of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial stations signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[2] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[3] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Friendship is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable systems' principal headend.

[1] We note that Friendship has not provided its headend coordinates to KMOS-TV as required by Section 76.58(b) of the Rules, despite KMOS'TV's letter of December 23, 1992 requesting carriage. As such, we accept petitioner's conclusion that Friendship's headend for this system is located at Roach, Missouri.

[2] Generally, if the test results for UHF stations are less than -51 dBm we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable test results.

[3] *See* §76.61 of the Commission's Rules.

5. Accordingly, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3)(47 U.S.C. §535) of the Communications Act of 1934, as amended, and Friendship Cable of Missouri IS ORDERED to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Roach, Missouri, forty-five (45) days from the release date of this *Order* unless Friendship submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3890-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1993; Released: January 18, 1994

By the Chief, Mass Media Bureau

1. On July 6, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of cable television systems serving Garden City and East Lynne, Missouri had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend located at North latitude 94°11'28" and West longitude 38°33'40" and is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which the station broadcasts over-the-air.

2. Although no formal opposition was filed, in a letter dated June 1, 1993, to KMOS-TV, Douglas maintained that the station's signal strength at Douglas' headend was not sufficient to entitle it to mandatory carriage on Douglas' systems serving Garden City and East Lynne.[1]

3. Douglas' letter dated June 1, 1993, to KMOS-TV concerning its signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. The 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations; however, it did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial stations signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[2] In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[3] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Douglas is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable systems' principal headend.

4. Since Douglas filed no further pleadings in the above proceeding, the complaint filed July 6, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3)(47 U.S.C. §535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television systems serving Garden City and East Lynne, Missouri, forty-five (45) days from the release date of this *Order* unless Douglas submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] In response, KMOS-TV submitted a report dated June 16, 1993, from Consulting Engineer, Donald L. Markley, confirming that both East Lynne and Garden City are within KMOS-TV's predicted Grade B contour, calculated pursuant to §73.684 of the Commission's Rules.

[2] Generally, if the test results for UHF stations are less than -51 dBm we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24 hour period with measurements not more than four hours apart to establish reliable test results.

[3] *See* §76.61 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3955-M
State University against	MO0828
Douglas Cable Communications	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 6, 1993; Released: January 18, 1994

By the Chief, Mass Media Bureau

1. On July 1, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Emma, Missouri had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's headend located at North latitude $93^{0}29'40"$ and West longitude $38^{0}58'18"$ and is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the Emma cable system, and it has requested carriage of its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 1, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five days (45) from the release of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-170

In re Applications of

TRACY A. MOORE d/b/a GIFFORD ORION BROADCASTING, LTD. File No. BPH-880308MK

JOHN E. MORRIS and LAWRENCE R. BAKER d/b/a MORBAK COMMUNICATIONS FILE NO. BPH-880309ME

AMERIWAVE, INC. FILE NO. BPH-880309MF

JIANT BROADCASTING COMPANY, INC. FILE NO. BPH-880310ME

MOLLY BEARD BROADCASTING, LTD. FILE NO. BPH-880310MS

For Construction Permit for a New FM Station on Channel 234A, Gifford, Florida

MEMORANDUM OPINION AND ORDER

Adopted:December 17, 1993; Released: December 21, 1993

1. This order accepts an amendment reporting changes in Ameriwave, Inc.'s ownership structure, integration proposal, and technical proposal; approves a settlement agreement in the above-captioned comparative proceeding providing for the grant of Ameriwave's amended application and the dismissal of the competing applications filed by Gifford Orion Broadcasting, Ltd., Morbak Communications, Jiant Broadcasting Company, Inc., and Molly Beard Broadcasting, Ltd. in exchange for payments not exceeding their legitimate and prudent expenses; and terminates this proceeding.

2. In an initial decision, Administrative Law Judge John M. Frysiak determined that, by virtue of its quantitatively superior integration proposal and its very slight comparative coverage preference, Molly Beard Broadcasting was the comparatively superior applicant. *Tracy A. Moore d/b/a Gifford Orion Broadcasting*, 7 FCC Rcd 3391 (ALJ 1991).

3. While exceptions were pending before the Review Board, Ameriwave entered into settlement agreements with the four competing applicants, which contemplated the grant of Ameriwave's amended application and the dismissal of each of the competing applications in exchange for monetary payments not exceeding its reasonable and prudent expenses.[1] In addition to the monetary payment, Molly Beard would, as an individual, also receive payments totalling $60,000 pursuant to a two year consulting agreement with Ameriwave.

4. Ameriwave also sought to amend its application to reflect that, in order to finance the settlement agreement, it had entered into a Settlement Facilitation Agreement with James Pagano and his company, Media 5, Inc., neither of which has an interest in Ameriwave or in any of the competing applications at issue in this adjudicatory proceeding. Pursuant to that agreement, Pagano acquires an immediate 49% interest in Ameriwave, and Media 5, Inc. will have the option of acquiring the balance of Ameriwave's stock as soon as is legally permissible under 47 C.F.R. § 73.3597(a). However, Ameriwave has a reciprocal option to reacquire Pagano's initial 49% interest in the event that Media 5 seeks to exercise its option to acquire control of Ameriwave. The amendment also reflects certain changes in Ameriwave's integration and technical proposal.[2]

5. The Review Board denied the settlement agreement and Ameriwave's related request to amend its application. *Gifford Orion Broadcasting, Ltd.*, 8 FCC Rcd 3577 (Rev. Bd. 1993). In so doing, it indicated that, although certain aspects of the agreement had been approved in other cases, the approval of "a composite agreement so closely skirt[ing] previously approved settlements" would contravene the monetary limits of 47 C.F.R. § 73.3525, as well as the Commission's recent efforts to keep its comparative hearing process free from abuse. *Id.* at 3579 ¶ 10.

6. Following the Review Board's decision, the parties to the agreement filed a Joint Application for Review.[3] In addition, they have modified the settlement agreement in

[1] Under the terms of the agreement, Moore will be paid $65,000; Morbak $30,000; Jiant $75,000; and Beard $75,000.

[2] According to the Mass Media Bureau's February 18, 1993 response to Joint Request for Approval of Settlement Agreements and Petition for Leave to Amend, its engineering staff has reviewed Ameriwave's amendment and has determined that it conforms with the Commission's technical rules. The Bureau has also confirmed, despite James Pagano's other media interests, that the number of stations in the Vero Beach/Gifford market are sufficient to allow him to have the proposed 49% interest in the Gifford station.

[3] In addition to the Joint Application for Review filed on June 3, 1993, by Gifford Orion Broadcasting, Morbak Communications, Ameriwave, Inc., Jiant Broadcasting Company, and Molly Beard Broadcasting (Gifford Orion Broadcasting, et al.), the following pleadings are pending before the Commission: (a) Joint Petition for Leave to File Application for Review, filed June 3, 1993, by Gifford Orion Broadcasting, et al.; (b) Opposition to Joint Petition for Leave to file Application for Review, filed June 9, 1993, by the Mass Media Bureau; (c) Statement of *Amici Curiae* Withdrawing Opposition to Approval of Settlement Agreements, filed June 4, 1993, by Media Access Project and Telecommunications Research and Action Center; (d) Comments In Support of Settlement and of *Amici Curiae* Request for Adoption of a Prospective Interpretive Policy Statement, filed June 10, 1993, by Media 5, Inc.; (e) Joint Comments Concerning *Amici Curiae* 's Request for Adoption of a Prospective Interpretive Policy Statement, filed June 10, 1993, by Gifford Orion Broadcasting, et al.; (f) Supplement to Joint Application for Review filed on October 19, 1993, by Gifford Orion Broadcasting, et al.; (g) Comments in Support of Settlement, filed October 19, 1993 by Media 5, Inc.; (h) Addendum to Supplement to Joint Application for Review, filed on October 28, 1993, by Ameriwave; (i) Petition for Leave to Amend, filed

response to the concerns raised by the Mass Media Bureau, and by the Review Board.[4] The Mass Media Bureau, which initially opposed the settlement agreement, supports the revised agreement, as well as Ameriwave's modified integration commitment, as being consistent with Commission precedent and policy.[5]

7. The Joint Request for Approval of Settlement, as revised, complies fully with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 governing settlement agreements. The parties have submitted copies of the settlement agreements between Ameriwave and each of the dismissing applicants. In addition, each party to the agreements has submitted a statement under penalty of perjury from one of their principals both explaining that approval of the settlement agreement will serve the public interest by conserving the resources of the Commission and of the parties and by expediting new broadcast service to the community of Gifford, Florida, and certifying that their respective applications were not filed for the purpose of entering into a settlement. The statements further verify that the settlement payments are limited to the applicants' reasonable and prudent expenses in preparing, filing, and prosecuting their respective applications.[6] Each party to the agreement has also furnished a declaration and/or documentation corroborating the expenses for which it is being reimbursed.

8. With regard to the proposed participation of nonparties James Pagano and Media 5, the revised agreement does not conflict with *Rebecca Radio of Marco*, 5 FCC Rcd 937, recon. denied, 5 FCC Rcd 2913 (1990). James Pagano initially gets only a 49% ownership interest and Ameriwave has a reciprocal option to reacquire Pagano's 49% interest if Media 5 seeks to exercise its option to acquire control of Ameriwave. Furthermore, before Media 5 could acquire Ameriwave's 51% interest, the Commission would be required to review Media 5's qualifications to be a licensee pursuant to 47 U.S.C. § 310(d) and make a public interest finding regarding any transfer of control of a licensee or permittee. See *David A. Davila*, 6 FCC Rcd 2897 (1991).

9. The Commission has held that a successful applicant awarded a construction permit as a result of a settlement agreement filed with the presiding Judge after the completion of discovery is expected to fulfill its integration and divestiture proposals. *Comparative Hearing Reform*, 6 FCC Rcd 157, 160 ¶ 21 (1990), clarified, 6 FCC Rcd 3403 ¶ 6 (1990), further petition for reconsideration and/or clarification pending. Here Ameriwave seeks to partially modify its original integration proposal that all three owners (Gene A. Folden, William J. Thompson, and William F. Sherry) be fully integrated. Ameriwave now proposes that William F. Sherry be integrated 20 hours per week as General Manager and that, in lieu of Folden and Thompson, 49% owner James Pagano will be integrated as full-time Operations Manager and that Media 5 principal Jeanette Pagano will serve as full-time General Sales Manager.

10. Ameriwave submits declarations from Folden, Sherry, and Thompson certifying that their respective integration pledges were made with the full intention of honoring them and that the revised proposal is based on changed circumstances. Ameriwave also urges that its modification is consistent with *Proposals to Reform the Comparative Hearing Process*, 6 FCC at 3405 ¶ 23, inasmuch as its original integration proposal was not credited by the ALJ or relied on by the parties in reaching this agreement. Whether such circumstances are an appropriate basis for a successful applicant to modify its integration proposal is being considered in connection with the pending petition for further reconsideration in *Hearing Reform* noted above. Whatever the outcome of that inquiry concerning the Commission's policy for the future, it appears that the public interest will be served by approval of the revised settlement agreement, which will permit immediate initiation of new broadcast service to Gifford, Florida.

11. ACCORDINGLY, IT IS ORDERED That pursuant to the authority granted under 47 C.F.R. § 0.251(f) the Joint Petition for Leave to File Application for Review filed on June 3, 1993, by Gifford Orion Broadcasting, et al. and the Joint Application for Review filed on June 3, 1993, and supplemented on October 19 and 28, 1993, by Gifford Orion Broadcasting, et al. ARE GRANTED.

12. IT IS FURTHER ORDERED That the Petition for Leave to Amend, filed February 8, 1993, by Ameriwave, Inc., and the Further Supplement to Petition for Leave to Amend, filed on October 28, 1993 by Ameriwave ARE GRANTED; and that the following amendments to Ameriwave's application ARE ACCEPTED: (a) the amendment submitted for filing on February 8, 1993; (b) the

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on February 8, 1993, and Further Supplement to Petition for Leave to Amend, filed on October 28, 1993, by Ameriwave; and (j) Mass Media Bureau's Comments on Supplement to Joint Application for Review, filed October 29, 1993. Consistent with the Commission's policy of disposing of adjudicatory cases as expeditiously as possible and in order to permit consideration of the parties' unopposed settlement agreement which would resolve this proceeding, the parties' Joint Petition for Leave to File and their Joint Application for Review will be granted.

[4] Specifically, the consulting agreement between Molly Beard and Ameriwave now provides that she must furnish at least 400 hours of consulting services over the life of the contract. In addition, the Settlement Facilitation Agreement between Ameriwave, James Pagano, and Media 5 no longer requires that Ameriwave must enter into a leased management agreement with Media 5 if it exercises its reciprocal option to reacquire James Pagano's initial 49% interest. As to Ameriwave's integration proposal, the revised agreement provides that original owner, William F. Sherry, will be integrated 20 hours per week, and that 49% owner James Pagano will be integrated full-time, as will his wife, Jeanette Pagano, who is a Media 5 principal.

[5] The Bureau notes that Ameriwave will not totally withdraw its original integration proposal and that management responsibilities are adequately addressed in the modified proposal.

[6] Under the revised consulting contract between Molly Beard and Ameriwave, Beard will be paid $60,000 over two years. In exchange, Beard must provide at least 400, but not more than 800, hours of consulting services. This means that Beard will be paid at least $75.00 but not more than $150.00 per hour, depending on how many hours Ameriwave requests her to work. Given Beard's local broadcast experience, which is somewhat different from and thus supplements that of James Pagano, this compensation does not appear to be excessive. Therefore, the payment is fair compensation for services actually to be rendered by Beard, rather than consideration for her agreement to dismiss her application, and it does not violate the limitation on settlement payments set forth in section 73.3525. See generally *Venton Corporation*, 90 FCC 2d 307, 312-14 ¶ ¶ 8-12 (1982); *Texas Television*, 91 FCC 2d 1043, 1045 ¶ 5 (Rev. Bd. 1982).

Supplement to Amendment, submitted for filing on March 2, 1993; and (c) the Second Supplement to Amendment, submitted for filing on October 28, 1993.

13. IT IS FURTHER ORDERED That the Joint Request for Approval of Settlement Agreement filed on February 8, 1993 by Gifford Orion Broadcasting, et al., as revised by Supplement to Joint Application for Review filed October 19, 1993, by Gifford Orion Broadcasting, et al. and by Addendum to Supplement to Joint Application for Review filed on October 28, 1993 by Ameriwave IS GRANTED; that the Settlement Agreements, as supplemented, ARE APPROVED; that the application of Ameriwave, as amended, (File No. BPH-880308MK) IS GRANTED; and that the applications of Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd. (File No. BPH-880308MK), John E. Morris and Lawrence R. Baker d/b/a Morbak Communications (File No. BPH-880309ME), Jiant Broadcasting Company, Inc. (File No. BPH-880310ME), and Molly Beard Broadcasting, Ltd. (File No. BPH-880310MS) ARE DISMISSED.

14. IT IS FURTHER ORDERED That the adjudicatory proceeding in MM Docket 90-170 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

John I. Riffer
Associate General Counsel
Office of General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-62

In the Matter of

Guidelines for Evaluating the
Environmental Effects of
Radiofrequency Radiation

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: January 7, 1994; Released: January 10, 1994

Comment Date: January 25, 1994
Reply Comment Date: February 24, 1994

By the Chief, Office of Engineering and Technology

1. On January 3, 1994, CBS Inc. ("CBS") filed with the Commission a "Motion for Extension of Time" in the above-named proceeding. CBS requested that the Commission extend, by a period of fourteen (14) days, the time for filing comments and reply comments.

2. The Commission has proposed to incorporate into its rules the newly revised standard of the American National Standards Institute (ANSI) developed by the Institute of Electrical and Electronics Engineers (IEEE) and designated IEEE C95.1-1991 (also ANSI/IEEE C95.1-1992) for human exposure to radiofrequency (RF) fields.[1] The deadline originally established for filing comments in this proceeding was August 13, 1993, and the date for reply comments was September 13, 1993.

3. Previously, on August 3, 1993, the Commission granted a request filed by the National Association of Broadcasters (NAB) for an extension of time of ninety (90) days for filing comments and reply comments.[2] This action established a new deadline for filing comments of November 12, 1993, and a new deadline for filing reply comments of December 13, 1993.

4. Subsequently, on November 2, 1993, CBS and Capital Cities/ABC Inc. filed a request to extend the comment and reply comment deadlines an additional sixty (60) days. The Commission approved this request establishing a new deadline for filing comments of January 11, 1994, and a new deadline for filing reply comments of February 10, 1994.[3]

5. The first extension was granted to allow NAB time to complete a study commissioned to develop non-measurement based techniques for determining compliance with new guidelines. The second extension was granted in response to filings by CBS, Capital Cities, and Hammett and Edison, Inc., noting that new information from the NAB study and other experimental results relevant to the consequences of the proposed guidelines had only recently become available. CBS and Capital Cities maintained that additional time was necessary to consider the implications of the new data, both to determine whether further study was required and to assess the effect that the proposed guidelines will have on broadcast operations.

6. The most recent motion filed by CBS requests an additional fourteen day (14) extension of the comment and reply comment deadlines. CBS states that it has not had sufficient time to perform measurements and analysis of data due to a delay in obtaining the equipment necessary to measure induced currents. CBS states that it has acquired preliminary data that it believes will be useful to the Commission in considering the implementation of the induced current limits. However, additional time is needed to organize and analyze the data. Further, CBS states that it hopes that the additional time will make possible the filing of a single set of comments representing the views of itself and several other broadcast entities.

7. The Commission does not routinely grant requests for extensions of time.[4] However, we continue to recognize the complexity of the issues raised by the new exposure guidelines and the difficulties in developing reasonable methods by which compliance can be evaluated. In that regard, the request by CBS for a nominal further extension does not appear to be unreasonable.

8. Accordingly, IT IS ORDERED THAT the deadline for filing comments IS EXTENDED to January 25, 1994, and the deadline for filing reply comments IS EXTENDED to February 24, 1994. This action is taken pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241 and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241 and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

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[1] See *Notice of Proposed Rule Making* in ET Docket 93-62, 8 FCC Rcd 2849 (1993).
[2] *See Order Extending Time for Comments and Reply Comments*, ET Docket 93-62, 8 FCC Rcd 5528 (1993).
[3] 58 Fed. Reg. 60827 (November 18, 1993).
[4] 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT Corporation - Transmittal No. 15
COMSAT Mobile Communications
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1994; Released: January 6, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 24, 1993, COMSAT Mobile Communications (COMSAT) filed Transmittal No. 15 to provide Temporary Standard A Voice Study Service (Temporary Voice). Transmittal 15 is scheduled to take effect on January 8, 1994, on 45 days' notice. Seven Seas Communications, Inc. (Seven Seas) filed a petition to reject or suspend and investigate Transmittal 15, and Comsat filed an opposition to Seven Seas' petition.

2. COMSAT describes Temporary Voice service as an offering intended to examine the price elasticity of ship-to-shore Standard A voice traffic terminating in specific area and country codes,[1] when rates are reduced from the existing COMSAT Customer Discount Plan by $0.75 per minute. The offering is limited to specific time-of-day periods in different service areas, and will terminate at midnight April 1, 1994. COMSAT states the proposed rates will recover the fully allocated costs of the offering. COMSAT Transmittal No. 15, Description and Justification at 1.

3. Seven Seas contends that COMSAT's offering constitutes unjust and unreasonable discrimination by targetting potential ship-to-shore customers in the fishing industry to the exclusion of other maritime vessels, in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Seven Seas asserts that the time period covered by the COMSAT offering spans the heart of the 1994 fishing season and that the Inmarsat numbers assigned to the four area codes and seven country codes specified in the offering are predominantly assigned to fishing vessels. Seven Seas Petition at 1. Seven Seas adds that a previous test of price elasticity for Standard A service involved discounts of several dollars per minute and that it is not apparent what COMSAT could learn additionally from the offering of the lesser discount.

4. COMSAT replies that its temporary offering is available to all enrollees in its Customer Discount Plan who notify COMSAT of their desire to participate. COMSAT asserts that price elasticity studies cannot rest on one price point alone, and it needs to determine whether discounts less than a dollar will stimulate demand. COMSAT Reply at 1-2. COMSAT states that the specified area and country codes represent markets in which COMSAT faces strong competition for service, including resellers such as Seven Seas, and has already observed a "noticeable erosion" of commercial business. COMSAT Reply at 3.

5. The Common Carrier Bureau has reviewed the COMSAT transmittal, Seven Seas' petition, and COMSAT's reply. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to warrant rejection, or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by Seven Seas Communications, Inc., against COMSAT Mobile Communications, Tariff F.C.C. No. 1, Transmittal No. 15, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] By Transmittal 20, filed January 5, 1994, COMSAT amended its offering to specify the geographic areas served by the designated area and country codes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF OHIO, and CENTRAL TELEPHONE COMPANY OF NEVADA,
Defendants.

File No. E-93-031

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: January 11, 1994; Released: January 21, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On December 31, 1992, Allnet Communication Services, Inc. (Allnet), filed the above-captioned complaint against Central Telephone Company of Ohio and Central Telephone Company of Nevada, seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 6, 1994, however, Allnet and Century Telephone of Ohio, Inc., the successor in interest to Central Telephone Company of Ohio, filed a joint motion to partially dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' motion to partially dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss With Prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED to the extent it relates to Allnet's claims against Central Telephone Company of Ohio.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILTEL, INC.,
Complainant,

v.

THE AMERITECH OPERATING COMPANIES, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE CO., INC. MICHIGAN BELL TELEPHONE CO., THE OHIO BELL TELEPHONE CO., WISCONSIN BELL, INC.,
Defendants.

File No. E-93-128

ORDER

Adopted: January 11, 1994; Released: January 21, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1993, WilTel, Inc. (WilTel) filed the above-captioned formal complaint against The Ameritech Operating Companies (Ameritech) seeking damages resulting from Ameritech's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On January 3, 1994, however, WilTel and Ameritech filed a joint motion to dismiss the complaint with prejudice stating that the parties have agreed to a settlement which disposes of all issues in controversy in the above-captioned complaint[1]

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that WilTel's and Ameritech's Joint Motion to Dismiss IS GRANTED to the extent indicated here.

4. IT IS FURTHER ORDERED that the Joint Motion to Dismiss IS DISMISSED AS MOOT insofar as it relates to File Nos. E-90-447, E-90-448, E-90-449, and E-90-450.

5. IT IS FURTHER ORDERED that the above-captioned complaint proceeding IS DISMISSED WITH PREJUDICE and IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
and Investigations Branch
Enforcement Division
Common Carrier Bureau

[1] We dismiss as moot the parties' request for dismissal of four unrelated complaints previously filed by WilTel alleging violations by Ameritech of the Commission's rate of return prescription for the January 1, 1987 through December 31, 1988 monitoring period. The Commission released a final order resolving these complaints on March 15, 1993 and the issues raised in the complaints are no longer before us. Section 208 Complaints Alleging Violations of the Commissions's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 1876, *recon. granted in part*, 8 FCC Rcd 5485 (1993), *appeals docketed sub nom. MCI Telecommunications Corporation et al. v. FCC*, Nos. 93-1528 *et al.* (D.C. Cir. Mar. 17, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECHARGE, INC.,
Complainant,

v.

PACIFIC TELESIS GROUP, File No. E-92-075
Defendant.

ORDER

Adopted: January 10, 1994; Released: January 21, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 4, 1992, International Telecharge, Inc. (ITI), filed the above-captioned formal complaint against Pacific Telesis Group and its operating companies, Pacific Bell and Nevada Bell (jointly "Pacific") seeking to recover damages from Pacific for alleged violations of the Commission rules in connection with Pacific's computation and assessment of terminating carrier common line ("CCL") charges. On January 5, 1994, ITI and Pacific filed a joint motion to dismiss the complaint stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss The Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

R & R Communications, Inc.
Wilmington, Delaware

NAL/Acct. No.: 315PA0002

Liability for Monetary Forfeiture

ORDER

Adopted: January 7, 1994; Released: January 21, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. R & R Communications, Inc. (Petitioner) seeks reconsideration of the Philadelphia Office's December 8, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $2,000 for violating Section 302(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2:803, by marketing an amateur radio transceiver that had been modified to operate on non-amateur frequencies.[1] As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $2,000.

II. BACKGROUND

3. On October 22, 1992, R & R Communications, Inc. offered for sale two Ranger Communications Transceivers, Models RCI-2970 and RCI-2950. Sales literature indicated that one model would transmit on frequencies between 26.000 and 32.000 MHz and the other would transmit between 26.000 and 29.699 MHz. These frequency ranges include the band of frequencies allocated to the Citizens Band Radio Service (26.965 to 27.405 MHz). The equipment was offered for sale to two FCC inspectors from the Philadelphia Office posing as members of the general public.

4. On November 3, 1992, the Philadelphia Office issued a Notice of Apparent Liability (NAL) for $10,000 to Petitioner for violating Section 302(b) of the Act, 47 U.S.C. § 302(b) and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803. On November 25, 1992, Petitioner responded to the NAL. Petitioner admitted possessing the equipment in question for sale in its store but denied having offered it for sale to the FCC inspectors and denied that any violations occurred. After review of the response, the Philadelphia Office issued a Forfeiture Order on December 8, 1992, for $2,000.

III. DISCUSSION

5. Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules prohibit the marketing of equipment capable of causing radio interference prior to grant of an equipment authorization by the Commission. Equipment (other than external radio frequency power amplifiers) which will transmit only on frequencies allocated for the Amateur Radio Service is exempt from these rules. The devices in question were offered for sale in a retail store. Sales literature in the store and subsequent tests on one piece of equipment confirmed that the units had been modified so that they would operate on frequencies allocated to the Citizens Band Radio Service and the band of frequencies between those allocated to the Citizens Band Radio Service and the ten meter amateur band. Equipment capable of operating on these frequencies must be type accepted by the Commission prior to being marketed.[2] The equipment offered for sale was not authorized by the Commission for operation on those frequencies and thus could not be marketed.

6. Actual comsummation of a sale is not necessary for a violation of marketing regulations to have occurred. Advertising in printed media, displaying of devices in a sales environment such as a trade show, vender's showroom, or retail store, or distributing handouts or other information sheets giving the equipment's specificiations, price and availability information all constitute marketing as defined in Section 2.803 of the Commission's Rules.

7. Petitioner claimed in his response to the NAL that the equipment in question was authorized by the Commission. No record of such authorization can be located. In its request for reconsideration, Petitioner states that the equipment, since it is intended for use in the Amateur Radio Service, is not required to be authorized by the Commission. Petitioner would be correct in this assertion if the equipment could be made to transmit only in the band of frequencies (28.000 to 29.700 MHz) allocated to the Amateur Radio Service. When the equipment was modified to operate on the additional frequencies, the requirement for a Commission equipment authorization became applicable.[3]

8. In the request for reconsideration, Petitioner claims that one of the units offered for sale was not owned by Petitioner but rather had been submitted on consignment. Ownership of the equipment at the time of offer to sell is not pertinent. Petitioner, as marketer of the equipment, is the entity responsible for complying with marketing regulations.

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[1] The petition also requested information and materials associated with this case under the Freedom of Information Act. This statement does not consititute a formal request under the Freedom of Information Act. If the petitioner does seek to file a formal request, petitioner should follow the procedures outlined in Section 0.461 of the Commission's Rules, 47 C.F.R. § 0.461.

[2] Equipment capable of being operated in the Citizens Band Radio Service must be type accepted. *See* Section 95.603(c) of the Commission's Rules.

[3] *See* Footnote 2 above. Since the modified equipment was incapable of meeting the emission limitations of Part 95 technical regulations, it was ineligible for grant of an equipment authorization and, therefore, could not have been marketed even if an equipment authorization had been requested.

9. Petitioner claims that it has a constitutional right under the First Amendment to advertise for sale whatever equipment it wishes. We are unpersuaded by this argument. Both the Act and Commission Rules prohibit marketing unauthorized equipment.[4] Marketing includes advertising for sale or other activity intended to promote the change of ownership or posession.

10. Petitioner has failed to provide justification for cancellation or further reduction of the penalty for marketing non-approved equipment.

IV. CONCLUSION

11. For the reasons cited above, we affirm the finding of liability for monetary forfeiture at $2,000. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLAUSES

12. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that R & R Communications, Inc. FORFEIT to the United States the sum of two thousand dollars ($2.000) for the willful violation of Section 302(b) of the Communication Act and Section 2.803 of the Commission's Rules.

13. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that the forfeiture must be paid within thirty (30) days of the date of receipt of this ORDER.[5] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. 315PA0002, and must be mailed to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

14. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to R & R Communications, Inc., 2312 Carpenter Road, Wilmington, Delaware 19810.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith

Chief, Field Operations Bureau

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[4] Section 302(b) of the Act states: "No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic entertainment systems, or use devices, which fail to comply with regulations promulgated pursuant to this section." 47 U.S.C. § 302(b). Section 2.803 of the Rules states in part: "In the case of a radio frequency device, which, in accordance with the rules in this chapter must be ... type accepted ... prior to use, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease) or import, ship or distribute for the purpose of selling for leasing or offering for sale or lease, any such radio frequency device, unless, prior thereto, such devices shall have been ... type accepted ..." 47 C.F.R. § 2.803.

[5] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LIGHTCOM INTERNATIONAL, INC. File No. I-T-C-94-022

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Ocean Region Satellites for the Provision of INTELSAT Business Service and to provide international private line service.

ORDER AND AUTHORIZATION

Adopted: January 4, 1994; Released: January 21, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Busines Services (IBS) and international private line service by Lightcom International, Inc. (Lightcom).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-022 IS GRANTED, and Lightcom is authorized to:

a. establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS service; and

b. resell international private lines not interconnected with the public switched network for the provision of international private line services between the US and each of the international points specificed in the appendix hereto.

3. IT IS FURTHER ORDERED that the authority granted herein for Lightcom to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of Lightcom to provide private lines as part of its authorized service is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff or the Appendix hereto that is, private lines which originate in the United States and terminate in one of those countries listed in Comsat's IBS tariff or the Appendix hereto or which originate in one of those countries listed in Comsat's IBS tariff or the Appendix hereto and terminate in the United States. In addition, Lightcom may not -- and Lightcom's tariff must state that Lightcom's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

6. IT IS FURTHER ORDERED that neither Lightcom nor any persons or companies directly or indirectly controlling or controlled by Lightcom, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Lightcom or any persons or companies controlling or controlled by Lightcom are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

LEASED PRIVATE LINE SERVICE FOREIGN DESTINATIONS*

Antigua
Argentina
Australia
Austria
Bahamas
Barbados
Belgium
Belize
Bermuda
Botswana
Brazil
Cambodia
Canada
Chile
China
Commonwealth of Independent States
Colombia
Costa Rica
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
France
Germany
Greece
Grenada
Guadaloupe
Guatemala
Guyana
Haiti
Honduras
Hong Kong
India
Indonesia
Iran
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Malaysia
Mauritius
Mexico
Mozambique
Netherlands
New Zealand
Nicaragua
Nigeria
Norway
Pakistan
Panama
Peru
Poland
Portugal
Saudi Arabia
Seychelles
Singapore
Somalia
South Korea
South Africa
Spain
St. Lucia
Swaziland
Sweden
Switzerland
Taiwan
Tanzania
Thailand
Trinidad
United Kingdom
Venezuela
Vietnam
Yugoslavia
Zambia
Zimbawe

* 30 64 KBPS CIRCUITS TO EACH POINT

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT Corporation File No. CSS-92-004

For Authority to Participate in
a Program Involving Construction
of Certain Additional INTELSAT Satellites,
and Provision of Authorized Services

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 7, 1994; Released: January 21, 1994

By the Acting Chief, Common Carrier Bureau:

1. The Commission has before it an application filed by the COMSAT Corporation (Comsat) seeking authority, pursuant to Section 201(c) of the Communication Satellite Act of 1962, as amended, 47 U.S.C. § 721(c), and Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, to participate in the program of construction and use of two additional INTELSAT VIII satellites, one additional INTELSAT VII-A satellite and one additional INTELSAT VII satellite by the International Telecommunications Satellite Organization (INTELSAT). The satellites are to be used commencing in 1996 in the Atlantic Ocean Region (AOR) and the Pacific Ocean Region (POR) to replace and augment existing satellites that will reach the end of their design life in the 1995-97 time frame.

2. Application File No. CSS-92-004 was filed on July 24, 1992, supplemented on December 22, 1992 and February 24, 1993, and amended on April 20, 1993. Pan American Satellite (PAS) filed comments on August 31, 1992, seeking additional support data and reserving the right to formally object to the application later.[1]

I. APPLICATIONS

3. By its initial application, Comsat sought authority to participate in the procurement of two INTELSAT VIII satellites (F-1 at 174^0 East Longitude (E), POR; F-2 at 177^0 E, POR), one INTELSAT VII-A satellite (F-8 at 342^0 E, AOR) and one INTELSAT VII satellite (709 at 329^0 E, AOR) for service in the 1995-96 time frame. In its application supplement, Comsat included updated traffic projections and operational design modifications, as well as information indicating that INTELSAT's Director General might seek approval for the procurement of the satellites at the September, 1992 Board of Governors meeting. The two INTELSAT VIII satellites were projected to replace two INTELSAT VII satellites in the POR at 174^0 E and 177^0 E, which would then be redeployed to replace INTELSAT V series satellites in the Indian Ocean Region (IOR) at 66^0 E and in the POR at 180^0, which are reaching the end of their design lifetimes and are operating in inclined orbit.

4. In its December 22, 1992 Supplement, Comsat informed the Commission that the Board of Governors, at its September, 1992 meeting, decided to purchase two INTELSAT VIII satellites from the GE Astro Space Division (GE Astro) of General Electric Technical Services Company (GETSCO) and to exercise an option to its current contract with the Space Systems Loral (Loral) for an additional INTELSAT VII-A satellite. The Board concurred with INTELSAT Management's (IM) recommendation that Arianespace be selected to provide launch services for the two INTELSAT VIII spacecraft on order, with options for two additional launches subject to further negotiations, and approved a contingent contract with China Great Wall Industry Corporation (CGWIC) for launch services for the additional INTELSAT VII-A satellite.

5. In its February 24, 1993 submission, Comsat advised the Commission that the Director General intended to present a recommendation to the March 1993 Board of Governors meeting for procurement of an additional INTELSAT VII satellite from Loral. Comsat indicated that despite substantially reduced cost figures for optional spacecraft from Loral it did not foresee a great likelihood that a favorable decision would be taken at the March 1993 meeting. However, on April 20, 1993, Comsat reported that in view of the production of additional demand and capacity analyses, significantly reduced cost figures for optional spacecraft from Loral and early delivery of an additional INTELSAT VII, the Board decided to exercise an option for one more INTELSAT VII spacecraft (709).

6. The procurement of two INTELSAT VIII, one INTELSAT VII-A and one INTELSAT VII satellites is based on the Director General's Demand Forecasts. The trend data show that demand will increase for voice at an annual rate of 4%, international business services (IBS) at 6%, video at 16%, and other leased services at 17%, through year 2001. The overall demand for total INTELSAT capacity is 5% higher in the 1992 forecast than projected in 1991. In its Application, Comsat demonstrated the need for a 7+4+3 configuration by 1996[2] requiring three additional spacecraft to meet the continuity needs of the 57^0E, 66^0E and 180^0E orbital locations. Comsat states that the current 7+2+2 system configuration will be maintained until 1995 by the successful launch and deployment of the seven previously procured and authorized INTELSAT VII/VII-A spacecraft, allowing for two failures, whether occurring at launch or in orbit. After 1995, three additional replacement spacecraft are required for the 7+4+3 configuration. Comsat further indicates that the continuity needs of the 66^0E and 180^0E locations were to be met by the deployment of two INTELSAT VIII satellites to the POR, *i.e.*, to 174^0E and 177^0E, to free INTELSAT VII satellites for redeployment to 66^0E and 180^0E. Further, the procurement of an additional INTELSAT VII-A satellite for deployment to the AOR at the 342^0E location would free up an INTELSAT VII for redeployment to 57^0E. By year-end 1995, the systemwide and regional utili-

[1] Comsat, in its Supplement and Amendment, offered the additional information sought by PAS. PAS filed no further comments. We therefore consider Comsat's application unopposed.

[2] In previous filings the x-y-z notation reflected the fully station-kept operational satellites (x), the system spare (y) and the number of satellites in inclined orbit (z). Now, however, the numbers refer to the operational satellites in the three ocean regions, AOR (x), IOR (y) and POR (z).

zation figures are projected at 77% overall, with 74%, 86% and 68% in the AOR, IOR and POR, respectively. Utilization at key orbital locations, *viz.*, 332.5°E, 335.5°E, 342°E and 359°E in the AOR; 60°E, 63°E, 66°E in the IOR; and 174°E and 177°E in the POR, according to Comsat, will be at or above the critical 80% utilization level.[3] Comsat states that by year 2002 the system utilization of the 7+4+3 configuration is projected to be 89%, with 91% in the AOR, 90% in the IOR and 81% in the POR.

7. In its Amendment, Comsat reports that further analysis by IM, working in conjunction with INTELSAT Signatories, has quantified the "unmet demand" anticipated for the AOR and IOR regions by year 2002. Based on these studies the projected utilization of the INTELSAT VII (709) at start of service should range between 41% on committed demand to 64% based on committed and forecasted demand, with total utilization at 82% by year 2002, when the new satellite will be only at one-half its useful life. In sum, the updated projected utilization for all satellites in the 8+4+3 configuration in the AOR for year 2002 will be at or above the critical overall utilization level.

II. DISCUSSION

9. The issue before us is whether there is need for the procurement and operation of four INTELSAT satellites, to replace existing satellites that will reach the end of their design lives in the 1995-1997 time frame and to accommodate anticipated traffic demands. In earlier orders, the Commission examined INTELSAT's nominal deployment plan in great detail to confirm the need for new satellites. We determined in those orders that the maintenance of each orbital location was required by the particular traffic and connectivity requirements that each satellite at that location accommodated.[4] With the maturation of the INTELSAT network of satellites, competition in all markets by both separate satellite providers and transoceanic fiber optic cables, we believe it sufficient to examine the adequacy of the demonstration of need for the additional spacecraft Comsat seeks, and any other matters raised by the record.

11. Comsat's applications, as outlined herein, offer with considerable specificity the anticipated demand for regional routes and the plans under which unmet demand will be minimized and aging satellites removed to locations with less immediate expected growth. The Director General's Demand Forecasts and trend data show that overall demand will increase at a rate of some 5-7% through year 2002.[5] The IM-1992 forecasts and traffic projections through the remainder of the decade and beyond show increases over earlier Director General forecasts. The figures indicate that there is an increasing demand for the services provided by INTELSAT, as well as a continuing need to assure spacecraft spares for maintenance. Allowing for replacement spacecraft and failed launches, Comsat adequately demonstrates utilization and demand levels warranting the authorization of an additional four satellites.

12. One factor the Commission has considered in earlier proceedings assessing the need for requested facilities concerns the accuracy of the traffic projections submitted with the application. Notably, in *INTELSAT VII order, supra,* we ascertained that INTELSAT had taken the steps necessary in its traffic projection methodology to minimize the risk of excess capacity resulting from overstated traffic projections. As further discussed in *Additional INTELSAT VII order, supra,* the Director General Forecasts were established specifically to counterbalance the overly optimistic projections developed by the INTELSAT Global Traffic Meetings. Given the uncertainty inherent in traffic projections generally, INTELSAT's need to rely on the projections of its member countries, and increasingly robust marketplace competition, we believe that INTELSAT has provided acceptable demand and utilization forecasts in support of its applications, consistent with our earlier orders.

III. CONCLUSION AND ORDERING CLAUSES

13. As set forth above, we find that the procurement of two INTELSAT VIII satellites, one additional INTELSAT VII-A satellite and one additional INTELSAT VII satellite to replace existing satellites approaching the end of design life and to accommodate demand for services through year 2002 in the AOR, IOR and POR is reasonable. We conclude that Comsat's participation in the procurement of these satellites will serve the public interest.

14. Accordingly, IT IS ORDERED that application File No. CSS-92-004 IS GRANTED, and Comsat IS AUTHORIZED, pursuant to Section 201(c) of the Communications Act of 1962, as amended, 47 U.S.C. § 201(c), and Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, to participate in INTELSAT's procurement of two INTELSAT VIII satellites, one INTELSAT VII-A satellite and one INTELSAT VII satellite to be deployed in the AOR and POR in the 1995/1996 time frame for the replacement of existing satellites that will reach the end of design life and to accommodate increased service demand through the year 2002.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[3] The 1991 forecasts were 77% overall, with 75%, 86% and 70% in the AOR, IOR and POR, respectively. Comsat suggests that the two utilization results, based on two forecasts, confirm the need for the additional spacecraft at the 57°E, 66°E and 180°E orbital locations.

[4] *See* Communications Satellite Corporation, 5 FCC Rcd 753 (1990) (INTELSAT VII order); Communications Satellite Corporation, 7 FCC Rcd 3430 (1992) (Additional INTELSAT VII order); and Communications Satellite Corporation, 5 FCC Rcd 5952 (1990). INTELSAT's procurement of satellites throughout the 1990's was based on the 9+1(+3) nominal configuration. As noted above, however, the "nominal" configuration designation has been changed to reflect the distribution of satellites in the three world regions, AOR, IOR and POR. Our examination in the subject order and in future orders will focus on the overall justification of the newly sought satellites, including their cost and utilization forecasts. *See* n.2, *supra.*

[5] *See* paras. 6-7, *supra.*

FEDERAL COMMUNICATIONS COMMISSION

Kathleen Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-254

In the Matter of

Limitations on Commercial Time on
Television Broadcast Stations

ORDER

Adopted: December 29, 1993; Released: December 29, 1993

Reply Comment Date: February 4, 1994

By the Chief, Mass Media Bureau

1. This action extends the deadline for filing reply comments in response to the *Notice of Inquiry* in MM Docket No. 93-254, 8 FCC Rcd 7277 (1993), in which the Commission seeks comment on whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations. The Commission adopted the *Notice* on its own motion. Comments were due by December 20, 1993, and the deadline for reply comments was January 5, 1994.[1]

2. The Center for the Study of Commercialism, the Center for Media Education, the Consumer Federation of America, and the Office of Communication of the United Church for Christ (the parties) request a 30-day extension of the reply comment period in order to address adequately the matters asserted in the comments. The parties state that the reply comment period extends over the seasonal holidays, providing insufficient time in which to prepare an adequate reply. In addition, they state that their co-counsel, a clinical legal education program at a local law school, lacks the staff to prepare reply comments during the school holiday.[2]

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Grant of the request will provide the Commission a more substantial record upon which to base its findings. Therefore, pursuant to 47 C.F.R. § 0.283, the deadline for filing reply comments is extended until February 4, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] The Bureau altered these comments dates from the original dates set forth in the *Notice of Inquiry*. *Order* in MM Docket No. 93-254, DA No. 93-1425 (released November 22, 1993).

[2] The parties also state that an extension will allow the Commission to supplement the *Notice*. Specifically, they request that two pending petitions for rulemaking, both of which concern the Commission's rules on commercial sponsorship identification, be incorporated into this proceeding. However, we believe that the issues raised in the petitions for rulemaking are best addressed separately by the Commission. Accordingly, we decline to extend the range of issues addressed in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
January 5, 1994

MICRONESIAN TELECOMMUNICATIONS CORPORATION REQUESTS FOR DECLARATORY RULING

AAD 93-161

Comments: January 21, 1994
Reply Comments: January 31, 1994

Micronesian Telecommunications Corporation (MTC), filed a petition for declaratory ruling of the definition of "study area" as contained in Part 36, Appendix-Glossary of the Commission's rules. This request would allow the Commonwealth of the Northern Marianas (CNMI) to expand its already existing study area to include MTC's operating territories of the Northern Marianas, specifically the islands of Saipan, Tinian and Rota.

Parties may file comments on this petition no later than January 21, 1994. Replies should be filed by January 31, 1994. Comments should reference AAD 93-161. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, (202) 857-3800. Copies are available for inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from (ITS).

For further information contact Jacqueline Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the

800 Service Management System Tariff

ORDER

Adopted: January 3, 1994 **Released: January 4, 1994**

By the Chief, Tariff Division, Common Carrier Bureau

1. On July 19, 1993 the Bureau released an Order,[1] designating issues in our investigation of the 800 data base access tariffs. That order set deadlines by which oppositions to the local exchange carriers' (LECs) direct cases had to be filed. On August 5, October 18 and November 30, 1993, the Tariff Division released orders, each of which extended the time for filing pleadings responding to the LECs' direct cases. Currently, replies are due on January 5, 1994 and rebuttals are due on January 20, 1994. On December 28, 1993, the Ad Hoc Telecommunications Users Committee (petitioner) filed a motion to extend the time, until March 15, 1993 (sic), to file its pleadings responding to the LEC direct cases.

2. Several LECs have filed petitions for waiver of the cost disclosure requirements of paragraph 29 of the *Designation Order*.[2] Petitioners contend that this extension is necessary to allow the LECs to file, and the commenters to comment on, revised cost support if the Commission denies the LEC petitions for waiver.

3. The Division has reviewed petitioners' request for extension of time and has determined that good cause has been shown to grant an extension to all parties. Therefore, pleadings responding to the direct cases will now be due on February 15, 1994. Rebuttals to oppositions or comments will be due on February 28, 1994.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by Ad Hoc Telecommunications Users Committee IS GRANTED, to extend the deadlines for all parties in this proceeding to file pleadings responding to direct cases, and replies, as specified in paragraph 3 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, 8 FCC Rcd 5132 (1993) (*Designation Order*).

[2] *See also Public Notice, Participating Bell Operating Companies, US West and GTE Request Waivers of Requirement to Disclose Cost Support*, CC Docket 93-129, 8 FCC Rcd 7328 (1993) (established pleading cycle for comments on LEC petitions for waiver of cost disclosure requirements in this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 6, 1994

MAGAZINE TELEPH0NE COMPANY FILES PETITION FOR WAIVER

Pleading Cycle Established

COMMENTS: February 7, 1994
REPLY COMMENTS: February 22, 1994

On December 29, 1993, Magazine Telephone Company (Magazine) filed a petition for waiver of Section 69.3(f) of the Commission's Rules, 47 C.F.R. § 69.3(f). Magazine requests a waiver to permit it to file a small company traffic sensitive access tariff pursuant to Section 61.39 of the Commission's Rules with rates based on historical average schedule settlements that would become effective on July 1, 1994. The waiver would permit these rates to remain in effect for one year, when Magazine would file revisions to the rates pursuant to Section 61.39 of the Commission's Rules for a biennial period, as required by the rules.

Interested parties may file comments on this petition for waiver no later than February 7, 1994. Replies should be filed by February 22, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rues, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20554.

For further information, contact Andrew Mulitz or Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

RECOMMENDED DECISION

Adopted: November 16, 1993; Released: December 10, 1993.

By the Federal-State Joint Board:

I. INTRODUCTION AND SUMMARY

1. The Federal-State Joint Board hereby presents its recommendations for interim revision of Part 36 of the Commission's Rules ("Part 36 Rules") to moderate the growth of the Universal Service Fund ("USF"). In making these recommendations for interim action, we specifically make no decision regarding the appropriate permanent resolution of the issues raised herein.

2. We recommend the adoption of interim rules implementing an indexed cap approach which allows the USF to continue to grow at a rate no greater than the rate of growth in the nation's total working loops. If the current rules would cause the USF to grow beyond the indexed cap, we recommend adjusting the threshold amount for high cost assistance to recipients under the fund in order to produce a total USF at the indexed cap level.

3. We believe that this indexed cap mechanism should be effective only during the pendency of a full rulemaking by the Commission that comprehensively analyzes the Commission's Part 36 USF rules. Therefore, we recommend that the interim rules remain in effect for a period of no longer than two years after the date that they become effective, as prescribed in the Federal Register. The recommended action, designed to allow moderate growth in the USF during the interim period, is a reasonable compromise which prevents surges in the total USF level while avoiding the potential adverse effects of a total freeze on USF growth.

II. BACKGROUND

A. Creation and Prior Modification of the Universal Service Fund

4. In 1984, the Federal State Joint Board recommended, and the Commission adopted, rules creating the USF in order to preserve and promote universal telephone service.[1] The USF functions by allowing local exchange carriers ("LECs") with a high cost per loop to allocate a portion of that cost to the interstate jurisdiction, thus allowing the carriers to establish lower local exchange rates in those areas.[2] Eligibility for high cost assistance from the USF is assessed separately for each LEC study area, and the threshold for such assistance is 115 percent of the national average cost per loop.[3]

5. The USF rules contain a sliding scale, pursuant to which the highest cost study areas receive a greater degree of assistance than study areas whose cost per loop is only slightly above the threshold. Although all study areas with costs per loop in excess of the threshold receive high cost assistance from the USF, those study areas with the highest costs per loop are able to allocate the greatest percentage of those costs to the interstate jurisdiction. [4]

6. In 1987, upon the Joint Board's recommendation, the Commission revised the USF rules to shift assistance from large study areas to smaller study areas.[5] The Joint Board determined that small LECs are in greater need of assistance than large LECs.[6] Moreover, it was expected that the recommended 8 targeting would decrease the overall size of the USF.[7] Under the revised rule, effective January 1, 1988, USF assistance per loop was reduced for large study areas and increased for small study areas.[8]

B. The Commission's Interim Notice

7. On September 14, 1993, the Commission issued a notice of proposed rulemaking, proposing the adoption of interim USF rules with the limited purpose of moderating growth in the total level of the USF.[9] The rationale for the proposed rules was a concern regarding the extent and, particularly, the nature of USF growth. The Commission observed that annual USF growth since the inception of the fund has ranged from approximately one percent to more than 19 percent, for a total increase of approximately 60 percent.[10]

8. In its *Interim Notice*, the Commission proposed the adoption of interim rules that would remain in effect for two years[11] while the Commission and the Joint Board undertake a reevaluation of the USF assistance mecha-

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[1] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC2d 781 (1984).
[2] Hereinafter such additional interstate allocations shall be referred to as "assistance."
[3] 47 C.F.R. §36.631 (1992).
[4] *See* 47 C.F.R. §36.631 (1992).
[5] *I.e.*, from study areas with more than 200,000 working loops to study areas with 200,000 or fewer working loops. Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987) (*1987 Retargeting Order*).
[6] "Recommended Decision and Order," MTS and WATS Market Structure/Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2324, 2334, ¶86 (1987).
[7] *Id.* at 2333, ¶75 .
[8] *See* 47 C.F.R. §36.631(d) (1992).
[9] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 93-435 (released September 14, 1993) (*Interim Notice*).
[10] *Interim Notice* at 4-5, ¶13.
[11] The interim rules could be replaced by new rules in less than two years if we complete the broader USF rulemaking ahead of the anticipated two-year time frame.

nisms.[12] Review of the current USF rules is necessary because we have reached the end of the transition period for phasing in the basic allocation factor and the USF and because USF growth has manifested an erratic pattern of increases. The Commission expressed its expectation that a full examination of USF issues will be extremely complex, both in terms of balancing various public policy concerns and in terms of analyzing extensive data regarding current and proposed USF mechanisms. The Commission indicated that the proposed interim measures reflected its concern that continuing under the current rules during the pendency of that proceeding could exacerbate possible problems with the USF mechanisms and work at cross-purposes with eventual reformulation of the USF and its high cost support mechanisms.[13]

9. The Commission referred the issues raised in the *Interim Notice* to the Federal State Joint Board for a recommended decision. The Commission emphasized that it does not intend, at this time, to resolve the issue of whether the rate of USF growth should be subject to permanent indexing or control.[14] In the *Interim Notice*, the Commission proposed to implement interim rules to prevent excessive growth in the USF only during the pendency of a full USF rulemaking.

III. DISCUSSION

10. In its *Interim Notice*, the Commission announced its intention to initiate a rulemaking on a broad range of issues related to the USF and high cost assistance. The Commission proposed interim modifications of the USF high cost assistance mechanisms to ensure moderate growth in the USF during the pendency of the permanent rulemaking. At the outset, we wish to state our strong concurrence with the position that there is a need to consider revisions to the current USF rules. It has been ten years since this Joint Board's initial recommendation for the creation of the USF. We have reached the end of the transition period, during which the subscriber plant factor ("SPF") was replaced with the basic allocation factor and the USF. It is therefore appropriate to undertake a formal assessment of the effects and effectiveness of the USF to date.

11. More important, we believe that the numerous changes in the telecommunications industry during the past ten years compel careful evaluation of the existing assistance mechanisms. Regulatory, technological, and market changes have created new incentives and service capabilities that did not exist less than a decade ago. In the public forum, some voices are calling for a redefinition of traditional universal service goals to include advanced telecommunications services. The challenge for the Commission and for the Joint Board is to ensure that the USF high cost support mechanisms promote the accessibility and affordability of essential telecommunications services without creating or perpetuating economic inefficiencies or competitive inequities. We therefore support the Commission's intention to proceed with a rulemaking to reevaluate the USF rules and we urge the Commission to issue a notice of proposed rulemaking as soon as possible.

12. The Commission has referred to us issues related to changes in the Part 36 USF rules and has, specifically, requested our recommendation regarding the issue of appropriate interim Part 36 USF rules.[15] Although some commenting parties have characterized the measures proposed in the Commission's *Interim Notice* as major changes in the USF rules,[16] we do not find that to be the case. The *Interim Notice* does not propose to eliminate or even reduce the USF, nor does it propose to change the essential basis for determining eligibility for high cost assistance or the classification of recipients. In addition, the interim rules would be temporary in nature, in effect for a maximum of two years, and would not prejudge the issues for purposes of the broader rulemaking on permanent USF rule changes.[17] Finally, contrary to the interpretations of the proposals by some commenters,[18] none of the proposals constitutes a "freeze" on total USF assistance. Instead, all of the proposals contained in the *Interim Notice* are narrowly focused to ensure moderate growth in the total level of the USF during the pendency of a rulemaking to address the full range of USF and high cost assistance issues. Thus, we reject the conclusion that any of the proposals rises to the level of fundamental changes in the USF rules.

13. Numerous parties submitting comments in opposition to interim action emphasized that the USF has advanced the availability of telephone service at reasonable rates and is sufficiently serving its intended purpose.[19] The *Interim Notice* did not, however, question that premise nor propose to determine, at this time, the effectiveness of the current high cost assistance mechanisms. Rather, the *Interim Notice* concentrated on the growth pattern of the USF since its initial implementation. Although the effectiveness of the current USF rules in promoting universal service goals should be examined in the context of a permanent rulemaking, we do not believe those issues are relevant to the primary focus of the *Interim Notice*.

A. Growth in the Universal Service Fund

14. The *Interim Notice* described two sources of concern with respect to growth in the size of the USF. First, the pronounced overall USF growth of more than sixty percent in an eight-year period (or approximately seven percent per year) raised questions that should be addressed in a permanent rulemaking in the very near future.[20] Second, the *Interim Notice* referred to the erratic pattern of USF growth that has taken place since implementation of the USF rules.[21] The erratic nature of USF increases, and the prospect of surges in the USF level during the pendency of a permanent rulemaking, were cited as reasons for considering "interim rules to hold USF growth to a moderate rate during the pendency of [the permanent] rulemaking."[22]

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[12] *See* discussion of the interim proposals, *infra* at Section III.B.
[13] *Interim Notice* at 5, ¶16.
[14] *See infra* at ¶58.
[15] *See Interim Notice* at 2, ¶ 4.
[16] *See* MTA at 1; BellSouth at 3.
[17] *See Interim Notice* at 2 and 5, ¶ ¶ 4 and 17, respectively.
[18] *See* Matanuska at 9; NECA at 2; WITA at 3.
[19] CHA, at 2; NTCA, at 10; OPASTCO at 2; USTA at 6; VITELCO at 2-3; Century at 2; PTI at 2; PRTC at 4; SBA at 6-7; Madison at 1; Columbus at 1; Gorham at 1; Cunningham at 1.
[20] *Interim Notice* at p. 5, ¶14.
[21] *Id.* at pp. 4-5, ¶ ¶ 13-15.
[22] *Id.* at ¶15.

1. Overall Growth

15. *Comments.* Most commenters focused exclusively on the overall growth in the USF during the years it has been in place to support their view that interim rules to control USF growth are unnecessary.[23] Many parties argue that a seven percent average annual growth rate was not excessive.[24] Those parties contend that the need for modernization, the installation of additional facilities, and the effects of inflation establish the reasonableness of the overall USF growth rate.[25] NECA contends that another cause of the increase was the four percent average annual growth rate in the number of loops served by recipient study areas.[26] In opposition, MCI points out that USF growth has been over double the growth in the loops for those smaller carriers.[27] In addition, AT&T argues that inflation alone should have a minimal effect on the long-term capital expenditures which constitute the bulk of the loop costs upon which USF assistance is based.[28]

16. Some commenters disagree with the Commission's observation in the *Interim Notice* that the growth of the USF has increased the burden on interstate telecommunications.[29] In arguing that the burden on interstate communications has not increased, some parties compare the growth in total IXC minutes with USF growth and others focus upon growth in IXC revenues. MCI responds that cost comparisons based solely on interstate volumes and sales are misguided, because there is no direct correlation between interstate traffic and the non-traffic sensitive cost of the loop.[30] MCI submits data showing that, from 1986 to 1992, the USF portion of total interstate access charges paid by interexchange carriers has doubled, increasing from three percent to six percent. AT&T points out that when such factors as resizing, quarterly adjustments, correction of data errors, and NECA administrative expenses are considered, the USF amount per minute of interstate usage has incurred a continual *increase* during the past five years.[31] Further, AT&T presents data to demonstrate that the USF has increased as a percentage of revenue per minute of interstate usage.[32]

17. *Discussion.* We believe that concern regarding the reasonableness of the overall rate of increase in the USF is well-founded. We do not agree with commenters who would have us interpret the Commission's initial rejection of AT&T's proposed $1 billion USF cap as evidence that the rate of increase to date has been reasonable.[33]

18. The Commission's reluctance to include a USF cap in the initial permanent separations rules bears little or no relation to the reasonableness of the rate of growth over a particular time period.[34] Indeed, the proponents of the argument ignore the fact that, in the year following implementation of the USF, the Joint Board recommended and the Commission adopted, retargeting of the high cost assistance mechanisms intended, *inter alia*, to "decrease the total amount of money needed to support [high cost] companies."[35]

19. Moreover, as AT&T explains, its proposal for a $1 billion USF cap was made at a time when study area boundaries had not been frozen and, therefore, it was "permissible for LECs to manipulate their study areas to maximize their high cost support."[36] In addition, AT&T indicates that its 1983 cap request presupposed continued rate of return regulation of the largest LECs. These and other regulatory changes[37] have significantly changed the circumstances relevant to the size of the USF.

20. Similarly, we reject suggestions that the burden on interstate telecommunications should be evaluated in terms of the USF cost per minute of interstate toll usage. The USF charges applicable to interstate IXCs are not assessed on a per minute basis and the loop costs on which USF assistance is based are not, for the most part, usage sensitive.[38] Consequently, we believe that increases or decreases in interstate toll usage should not affect the size of the USF.

21. Although no commenter presented a comprehensive calculation of the factors that caused the USF to grow 60 percent since 1986, several parties cited inflation as a major causative factor.[39] We are skeptical of that argument be-

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[23] FW&A at 2; GVNW at 2; NECA at 3; PTI at 3-4; NTCA at ii.; OPASTCO at 3-4.

[24] Arkansas TA at 3-4; CHA at 3, 4, n.4 (annual inflation rate 1986-1992 was 3.8 percent) ; Century at 2; GTE at 2; NECA at 3-6 (overall inflation rate of 3.9 percent during period shows the growth is in line with annual loop growth of 2 to 3.6 percent); NTCA at 6-9 (asserting that the 7 percent growth in the USF is modest in view of the industry experiencing a 10 percent growth in interstate usage); NRTA at 3; OPASTCO at 3; JSI at 3; USTA at 4; US West at 4, 7 (cumulative inflation since 1986 was 28 percent); ITAG Reply at 2-3; Southwestern at 5-6; USTA Reply at 2 (the 7 percent growth rate is moderate, compared to the growth in USF supported access lines).

[25] *See* Arkansas TA at 3; ITC at 3; CHA at 4; ITELCO at 1; NECA at 4 & n.9 (submitting that all other factors remaining constant, inflation could have caused full transition USF to increase $590 million), Salina at 2. *See also* OPASTCO at 3; Vermont DPS at 4.

[26] NECA at 4.

[27] MCI Reply at 6.

[28] AT&T Reply at 4-5 (submitting that the LECs do not explain either why average annual growth in the USF since 1984 was almost twice the annual rate of inflation over the same period or why the fund's cumulative growth of 60 percent during that period was more than double the increase of 28% in the Consumer Price Index, *citing* CHA, at 4, n.4; US West at 7).

[29] *See* CHA at 3; Century at 5; JSI at 4; ITELCO at 1; Matanuska at 4; NECA at 6-7; NTCA at 6-7; TCA Reply at 2; US West at 4-8; USTA Reply at 3 (as a result of SPF transition and the Subscriber Line Charge, the burden of interstate NTS cost recovery has been reduced); VITELCO Reply at 2.

[30] MCI Reply at 6-8.

[31] *See* AT&T Reply, Attachment 1.

[32] *See* AT&T Reply, Attachment 2.

[33] *See* Joint Board's "Recommended Decision and Order" Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 47 Fed. Reg. 48325, 48335-36, ¶ ¶ 53 and 58. *See also* ATA at 2; Century at 2; GVNW at 2-3 (submitting that the current total growth level is 70-75 percent of the $1 billion proposed cap); OPASTCO at 4; Southwestern at 5 and Reply at 2; USTA, at 3; US West at 8, n.12 (citing *Office of Communications v. FCC*, 560 F.2d 529 (D.C. Cir.1977)).

[34] *See also* AT&T Reply at 3, n.3.

[35] *1987 Retargeting Order*, 2 FCC Rcd at 2958, ¶ 36.

[36] AT&T Reply at 3, n.3.

[37] One example of such changes is the adoption of Dial Equipment Minute weighting, as an additional support mechanism for small LECs. *See* the Joint Board recommendation, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 2 FCCRcd 2551 (1987), adopted by the Commission, 2 FCC Rcd 2639 (1987).

[38] MCI Reply at 6-7. *See also* discussion, *infra* at *¶41*.

[39] CHA at 5; NECA at 4; OPASTCO at 3; US West at 7.

cause it presupposes that the general rate of inflation should be fully reflected in overall USF growth. We note that the annual inflation rate for telephone service, during the 1986-92 time period, was signficantly less than the general inflation rate.[40] In addition, we believe that it is impossible to conclude, absent more information, that all expenditures associated with facilities modernization and expansion of service were necessary to preserve the availability of basic local service at affordable rates.

22. We do not, however, believe that it is necessary to reach a definitive conclusion regarding the reasonableness of past overall USF growth in order to decide whether interim rules to moderate growth are appropriate. The dispositive issue is whether it is advisable to adopt measures to deter large USF increases during the interim period. In the *Interim Notice*, the Commission indicated that the primary reason for considering interim rule changes to moderate growth in the USF was to deter pronounced increases in the fund during the pendency of a rulemaking to implement permanent rule changes. Specifically, the Commission cited the erratic nature of past USF growth, particularly sporadic large increases in the annual growth rate, as raising the prospect of similar sudden surges in the USF level during the next two years.[41] We therefore must evaluate the potential for sudden USF increases, as well as the likely effects) of such increases, during the interim period while the permanent USF rulemaking is in progress.

2. Fluctuations in the Rate of USF Growth

23. *Comments.* Some commenters submit that there has been no erratic growth in the USF. NECA and other commenters assert that yearly changes in USF growth have been reasonable and typically relate to external factors such as the overhaul of the Commission's accounting rules in 1988.[42] NTCA estimates that the effect of accounting changes on USF growth was somewhere between one and two percent.[43] GTE opines that fluctuations in the fund may be due to natural disasters.[44] Several commenters contend that surges in the USF reflect decisions by recipient LECs to invest in plant upgrades.[45] USTA challenges the Commission's belief that there are wide fluctuations, arguing that Part 36 does not require linear growth in the complex calculations of the USF.[46] On the other hand, Southwestern Bell asserts that the growth rate has been constant.[47]

24. *Discussion.* In fully considering the comments addressing the growth pattern of the USF, we find that no commenting party has effectively refuted the Commission's characterization of the USF growth pattern as "erratic." Indeed, one state commission indicated that, on an individual study area basis, changes in the amount of USF support have fluctuated widely, making it "virtually impossible to set rates for some small LECs for more than one year at a time."[48] In terms of the total USF, it seems clear to us from the Monitoring Report[49] that the annual rate of growth has varied extensively, ranging from one or two percent to more than nineteen percent.

25. We reject the argument that changes in the Commission's accounting rules are responsible for previous large increases in the USF. Because USF assistance is based upon the nationwide average cost per loop, accounting changes, which affect both USF recipients as well as non-recipient LECs, should not have a significant effect upon the USF growth rate.[50] Similarly, plant upgrades could explain a sudden increase in an individual recipient's amount of USF assistance, but not a sudden increase, in a single year, of the total USF. Claims by some commenters that the overall growth rate has stabilized are largely unsubstantiated and, in any case, are devoid of any basis for assurance that another sudden increase in the USF will not occur within the next two years.[51]

26. We believe that a sudden large-scale increase in the USF during the next two years would significantly impede the efforts of the Commission and this Joint Board to revise the USF rules on a permanent basis.[52] It is likely that the adoption of new USF rules will involve restructuring the current assistance mechanisms and retargeting support. Some groups of carriers or subscribers may require a greater degree of assistance and others, upon reexamination, may not need as much assistance as they currently receive. The consideration of new approaches regarding the level and targeting of support mechanisms is essential in order to promote affordability of services and to promote efficient usage of an increasingly complex telecommunications infrastructure.

27. Pronounced increases in the level of the USF during the pendency of a rulemaking to effect permanent USF changes would hamper efforts to accomplish significant redirection or restructuring of high cost assistance. In the past, changes in jurisdictional separations methodologies frequently have involved lengthy transition periods in order to ameliorate potentially disruptive effects upon those LECs subject to shifts in jurisdictional revenue requirements. If the USF were to increase significantly while a permanent rulemaking is underway, the transition process would be rendered much more difficult, particularly for carriers whose assistance grew pronouncedly during the interim period but who, under new permanent rules, would receive less support. This Joint Board has, in the

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[40] *See* "Monitoring Report" at Section 5 (May 1993), CC Docket No. 87-339. The consumer price index for telephone services during the 1986-1992 time period shows a total change of 5.5, as opposed to 32.3 for all items.

[41] *See* discussion, *supra* at ¶ ¶ *7 and 17*, and in *Interim Notice* at ¶ ¶ 13 and 15.

[42] NECA at 3-4; Century at 4; BellSouth Reply at 4.

[43] NTCA at 6, n.8.

[44] GTE at 3.

[45] Alaska Association at 2; ITCs at 3; JSI at 6 (attributing wide fluctuations to small LECs with less than 200,000 access lines receiving over 80% of USF monies and undertaking large, periodic construction programs rather than continuing projects); BellSouth Reply at 4 (variance in growth due to LECs that are unable to undertake ongoing investment projects, and, thus, do not exhibit steady trend in growth of costs).

[46] USTA at 4 and USTA Reply at 2-3 (fluctuations in USF growth are normal).

[47] Southwestern at 2.

[48] Florida PSC at 3-4.

[49] Monitoring Report, CC Docket No.87-339 (May 1993) at 71.

[50] Moreover, if there had been any USF effect due to the adoption of the new Uniform System of Accounts in 1988, NTCA estimates that the effect would have been only one to two percent. NTCA at 6, n.8.

[51] *See, e.g.,* PTI Reply at 3, *citing* NECA at 4.

[52] *See* discussion *infra* at ¶ 8.

past, recommended the adoption of interim rules to preserve the *status quo* pending the consideration and adoption of new jurisdictional separations rules.[53] In light of the Commission's announced intent to initiate a rulemaking to consider permanent changes in the USF rules, we believe that interim rules to ensure only moderate growth in USF assistance would facilitate implementation of revised assistance mechanisms.

28. Some moderate USF growth while the permanent USF rulemaking is in progress will ensure adequate support for the highest cost LEC study areas and, at the same time, protect against sudden large increases in the fund that could make retargeting or restructuring of the USF assistance mechanisms more difficult. Moreover, although a freeze of all recipients at their 1993 assistance levels would guarantee preservation of the *status quo*, we believe that the less extreme measure of allowing moderate USF growth during the interim period will afford recipient LECs some flexibility without jeopardizing our goal of avoiding large increases in the fund prior to revision of the rules.

B. Alternatives for Interim Rule Changes

29. Many of the commenters who disagreed with the Commission's proposal to adopt interim rules nevertheless expressed their preference for one of the proposed methodologies.[54] Preferences varied widely among those commenters.

1. The Indexed Threshold Method

30. The first proposal for moderating the rate of USF growth over the next two years is an indexed threshold for USF assistance. The indexed threshold approach would involve determining each year's nationwide average cost per loop by indexing the prior year's average cost per loop to the rate of growth in the average cost per loop for all non-price cap carriers. This would have the effect of indexing the USF threshold to the growth in cost per loop for non-price cap LECs. Indexing the threshold for high cost assistance would prevent, during the interim period, increases in USF growth due in part to the differing regulatory incentives of price cap and non-price cap LECs.[55]

31. *Comments.* A few commenters believe that Option 1, the indexed threshold method, is the preferred approach.[56] GVNW contends that an indexed threshold has the advantage of affecting the LECs closest to the 115 percent level of the national loop cost threshold while having a relatively small impact on the neediest, highest cost participants.[57] NRTA and Rochester Telephone concur that there would not be a significantly greater burden on companies with especially high costs.[58] OPASTCO asserts that Option 1 would facilitate efforts : to grant study area waivers.[59] PTI believes that, based on the record to date, this proposal would be the easiest to implement equitably and would best assure that the highest cost companies continue to receive assistance.[60]

32. Several commenters oppose Option 1. USTA criticizes the proposal because it would exclude from the index calculations a primary segment of the industry, the price cap LECs, when there is no reason to do so.[61] US West agrees, and further argues that an index based only on the comparatively small portion of loop plant revenue requirements associated with non-price cap companies would have a more volatile effect than current National Average Cost Per Loop calculations.[62] MCI believes that Option 1 would exclude the vast bulk of access lines from the calculation, causing the growth underlying the non-price cap cost per loop to exhibit a much greater degree of volatility than the aggregate growth in loops.[63] Morris adds that indexing of the threshold will not preclude increases to the fund because there will be numerous high cost telephone study area waivers over the next two years under which the transactions could potentially add hundreds of millions of dollars to the fund during the pendency of a long-term review.[64] Southwestern objects to the fact that, under Option 1, LEC study areas close to the threshold could lose the USF adjustment.[65]

33. *Discussion.* Upon review of the comments, we do not recommend that the Commission adopt Option 1. First, the indexed threshold approach presents no degree of certainty regarding the total USF level. [66] Moreover, we agree with parties who express concern that Option 1 has the potential for significant volatility due to the exclusion of price cap companies from calculation of the proposed index. In light of our concern regarding the possibility of sudden, sharp USF growth during the two-year interim period, it would make no sense to adopt a method that could cause rather than prevent large, erratic changes in the fund. Finally, we are not convinced that most price cap LECs consistently experience much smaller rates of growth in costs per loop than non-price cap LECs, and we therefore cannot recommend interim rules incorporating an index based upon the price cap/non-price cap distinction. For all of the foregoing reasons, as well as the reasons discussed *infra* in section 3.B.2., we do not believe that Option 1 represents the best solution to the problem of erratic USF growth.[67] Accordingly, we do not recommend that the Commission adopt the indexed threshold approach.

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[53] In 1981, the Joint Board recommended the freezing of the subscriber plant factor to preserve the *status quo* pending consideration and prescription of a new method for allocating non-traffic-sensitive local exchange plant. *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, FCC 81-565 (released December 14, 1981), *adopted*, 89 FCC 2d 1 (1982).

[54] Citizens at 3; Idaho PUC at 3-4; JSI at 8; PTI at 5-8.

[55] *Interim Notice* at 6, ¶ ¶ 20 and 21.

[56] Idaho PUC at 3; Indiana PUC at 2.

[57] GVNW at 7-10.

[58] NRTA at 5; Rochester Telephone at 2.

[59] OPASTCO, at 6.

[60] PTI, at 6.

[61] USTA at 8; *see also* AT&T at 6.

[62] US West Reply at 3 (US West estimates that the loop plant revenue requirements for non-price cap LECs is approximately nine percent of the nationwide industry total); *see also* NECA at 12, AT&T at 6, and GTE at 5.

[63] MCI Reply at 12.

[64] Morris at 1-2.

[65] Southwestern Reply at 3-4.

[66] *See* GCI at 2; MCI Reply at 13-14.

[67] We disagree with OPASTCO's argument that Option 1 would facilitate grant of study area waivers. The disposition of study area waivers is not limited to consideration of the issues raised with respect to interim USF rules. *See* discussion in JSI at 11 (the Commission should not delay granting of study area waivers based on concerns regarding the USF). In any case, the argument could just as readily be made that the indexed cap

2. The Indexed Cap Methods

34. The second proposal for moderating USF growth on an interim basis is an indexed cap that would allow the fund to grow at a moderate rate.[68] The Commission proposed, for this option, to use as an indexing factor the rate of growth in national total working loops.[69] The annual USF cap would be derived by applying the rate of growth in total working loops to the prior year's USF level. The Commission described two alternative methods of implementing the indexed cap approach.[70]

35. Option 2A, the first alternative method for implementing the indexed cap approach, would involve calculating what the USF assistance level for each recipient carrier would have been under the current rules and then adjusting each recipient's support proportionately to achieve the level of the indexed cap. Option 2B, the second method, would require adjusting the threshold amount for high cost assistance to a level producing a total USF at the indexed cap level. In practice, this method would involve adjusting the nationwide average cost per loop so that total USF assistance would equal the indexed USF cap.

36. *General Comments.* Several commenters favor the proposal for an indexed cap. AT&T believes that an indexed cap would assure reasonable growth, would be easy to administer, and would protect high cost study areas.[71] GCI prefers it because it is a direct cap on the total growth of USF that would prevent the fund from experiencing unreasonable growth.[72] GTE believes that an indexed cap would be the least disruptive option and provide greater assurance that there will be no "surprises" during the interim period.[73]

37. Some parties opposing the indexed cap approach argue that it would fail to recognize the impact of facility upgrades.[74] NRTA asserts that the adoption of an indexed cap would "send the wrong message to small LECs" regarding the Commission's commitment to high quality service and improvements.[75] Rochester contends that the indexed cap method would be more difficult to administer than an indexed threshold.[76] PTI states that an indexed cap would "contradict the reasoning underlying the Option [1] approach."[77] ITC argues that the current USF level may be calculated between surges and lag behind the necessary levels of funding.[78] Finally, the Illinois CC criticizes the indexed cap approach for not going far enough, pointing out that it "would simply contain growth of the USF" without limiting the amount of each company's USF assistance.[79]

38. *Discussion.* We believe that an indexed cap should be adopted because it affords a degree of certainty that is lacking in Option 1. This is an important consideration because the history of USF growth has been erratic, suggesting the possibility that the fund could increase suddenly during the two-year interim period while the permanent USF rulemaking is pending.[80] Pronounced growth during the pendency of the permanent rulemaking could interfere with attempts to revise or restructure the USF assistance mechanisms.[81]

39. In addition, as we discuss at greater length later in this decision, we believe that an indexed cap approach can be implemented in a manner which is consistent with the USF's underlying goals. Moderate USF growth during the interim period will preserve adequate assistance for the recipients most in need of assistance[82] and will continue to uphold the Commission's commitment to ensuring affordable local service. Moreover, because we do not recommend freezing each recipient's assistance level, there should be no significant adverse effect upon a company's ability to maintain high quality service or to provide necessary upgrades and improvements.

40. We do not foresee administrative problems that would substantially impede implementation of an indexed cap approach. As JSI concluded in its reply comments, "arguments regarding administrative ease' are misplaced" because NECA's "USF administration is already mechanized and implementation of any of the alternative proposals is simply a mathematical application."[83] We therefore recommend that the Commission adopt interim USF rules incorporating the indexed cap methodology.

a. Proposals for Alternative Index Factors

41. *Comments.* A few commenters propose alternative index factors for use with an indexed cap approach. NTCA proposes that the USF cap should be indexed to the rate of growth in interstate long distance minutes or interstate usage.[84] MTA, supporting NTCA's proposal, argues that under this alternative the USF would grow no faster than the sources of the revenue which pay for USF assistance.[85] Opponents of NTCA's proposal point out that there is no correlation between the NTS costs of a local loop and the amount of interstate traffic that it carries.[86]

42. Two state commissions, the Florida PSC and the Illinois CC, propose indexing or limiting the amount of USF assistance received by each LEC study area. The Florida PSC recommends a limit on the annual amount of

approach of options 2A or 2B would promote grant of study area waivers by providing a degree of certainty regarding the total level of the USF.

[68] *Interim Notice* at 7, ¶ ¶ 22-24.

[69] As defined in 47 C.F.R. §36.611(a)(8) (1992).

[70] *Interim Notice* at 7, ¶25.

[71] AT&T at 5-8.

[72] GCI, at 2.

[73] GTE at 5, 7. *See also* US West Reply at 2.

[74] *See* Southwestern at 9; USTA at 9; Arkansas TA reply at 3-4.

[75] NRTA at 5-6.

[76] Rochester at 2. *See also* JSI at 10 (raising questions regarding the details of implementation).

[77] PTI at 7. Problems with Option 1 approach are discussed *supra* at ¶ ¶ 33-35.

[78] ITCs at 5.

[79] Illinois CC at 2-3. Illinois's approach is discussed *infra* at ¶ ¶ 43-45.

[80] In addition, our experience with the USF has established that, absent appropriate measures, the USF would be likely to grow much faster than originally anticipated due to resizing at various points during the year. In 1993 alone, resizing added approximately $29 million to the USF.

[81] *See* discussion, *supra* at ¶ ¶ 17-31. Because our aim is to avoid sudden USF increases during the interim period, we do not regard ITC's speculation that the USF might be between surges as a valid argument against implementation of an indexed cap.

[82] *See* discussion at ¶ ¶ 36-50, *infra*.

[83] JSI Reply at 5.

[84] NTCA at 14-15; *see also* PTI at 3-4; NRTA Reply at 11-12.

[85] MTA Reply at 9.

[86] MCI Reply at 7. *See also* United Reply at 4-5.

change for individual study areas. It observed that in its regulation of LECs in Florida, it has encountered an excessive amount of annual fluctuation in USF assistance. The Florida PSC therefore advocates limiting annual changes in USF assistance to $.50 per loop per month to stabilize the earnings of small LECs from year to year.[87]

43. The Illinois CC proposes two alternatives. Under the first method, each LEC's cost per loop would be capped and indexed to the average rate of growth in cost per loop either for all LECs or for non-price-cap LECs. The Illinois CC believes that its proposal would provide incentives to LECs to control their costs by creating "a ceiling for the cost used to determine the level of assistance for an individual LEC."[88] A second variation on the Illinois CC's incentive approach would cap each LEC's total USF assistance directly, allowing increases only for growth in total working loops and, possibly, to recognize growth in national average loop costs. NRTA argues that the Illinois CC's analysis did not consider possible adverse effects upon upgrades or rate levels.[89] NRTA claims that high cost LECs already have an incentive to contain costs because REA borrowers' investments are reviewed for feasibility and cost containment.

44. *Discussion.* At this time, we do not recommend that the Commission adopt any of these new proposals for alternative index factors. The proposal to index the USF to the rate of growth in interstate toll minutes of use is directly at odds with the manner in which the USF is currently recovered from interexchange carriers. The collection of USF monies on the basis of presubscribed lines rather than on a per-minute basis reflects, in part, the fact that USF loop costs are not generally traffic sensitive. In addition, indexing growth in the USF to the rate of growth in interstate toll minutes would work at cross-purposes to the decision, made nearly ten years ago, to replace the usage-sensitive subscriber plant factor with a flat factor for allocating loop costs.[90] This proposal thus is inconsistent with prior separations and ratemaking policy decisions and we do not recommend that the Commission adopt it.

45. The proposals of the Florida and the Illinois commissions, as well as the concerns reflected in those proposals, appear to merit consideration during the broader rulemaking on permanent USF rule changes. Those proposals essentially address not only undue fluctuation in USF revenues on a study area-specific basis but also attempt to reduce possible uneconomic incentives inherent in the current rules. We believe, however, that the question of establishing USF assistance mechanisms that contain appropriate incentives for cost containment is a long-term issue that requires a significant amount of study. We make no finding regarding NRTA'S claim that the proposals could have adverse effects upon upgrades or rate levels, but, in light of such concerns, we believe that further examination of the proposals is required. We therefore do not recommend that the Commission adopt any of these alternative index factors during the two-year interim period.

b. Analysis of Options for Implementation of an Indexed Cap

46. *Comments.* The interim approach referred to by most commenting parties as Option 2A, the indexed cap with proportionate adjustment of each USF recipient's assistance per loop, received little support and was widely criticized. Parties filing in opposition to Option 2A contend that it would have a disproportionately high impact per loop on the highest cost companies with a minimal impact per loop on companies close to the threshold for receiving assistance.[91] Several commenters assert that Option 2A would inflict significant harm upon small LECs by causing a severe revenue loss.[92]

47. Although some commenters criticize Option 2B as more complex to administer than Option 2A,[93] others characterize Option 2B as a more equitable means of implementing an indexed cap approach.[94] Commenters preferring Option 2B to 2A point out that the effect on the highest cost USF recipients would be far less under 2B

[87] Florida PSC at 3-4.
[88] Illinois CC at 4. *See also* Northeast Telephone at 1.
[89] NRTA Reply at 9.
[90] The change was recommended by the Joint Board and adopted by the Commission.
[91] GVNW at 8; NRTA at 5 and NRTA Reply at 2; NTCA at 14 and NTCA Reply at 5; Pennsylvania PUC Reply at 5.
[92] US West at 9; NRTA Reply at 2; Florida PSC at 5; Pennsylvania PUC Reply at 5.
[93] PTI at 7; Rochester Telephone at 2.
[94] *See, e.g.,* GVNW at 9-10.

than under 2A.[95] MCI, changing its position on reply to support Option 2B, points out that the percentage change experienced by USF recipients would be progressively less for LECs with higher costs per loop.[96] US West characterizes Option 2B as "far superior" to Option 1 because it affords certainty and predictability.[97]

48. As an alternative to either Option 2A or 2B, several commenters suggested that an indexed cap approach could best be accomplished by adjusting each recipient's USF assistance by the same dollar amount per loop. Proponents contend that this method would be equitable because each recipient would experience the same amount of reduction per loop.[98]

49. *Discussion.* We have concluded that Option 2A should not be adopted. Although proportionate reduction of all recipients' assistance levels would be simple to administer, we believe that the benefit in ease of administration is more than outweighed by the disproportionately large effect upon the highest cost carriers. Many commenters point out that proportionate reductions would impose the largest decreases in assistance upon the study areas receiving the greatest amount of assistance--in other words, the highest cost 8 recipients.[99] In light of that effect, we recommend that the Commission not adopt method 2A, the first means of implementing the indexed cap approach.

50. We likewise reject the "equal adjustment per loop" alternative proposed by GVNW and others. This proposal has superficial appeal, but we believe that it would have an unfairly disproportionate effect upon large study areas. Because large study areas receive a smaller percentage of USF assistance per loop than small study areas at the same cost level, an equal monetary adjustment per loop would have a far greater effect upon the assistance per loop provided to large study areas. Although several commenters have suggested excluding or further limiting USF assistance to large carriers,[100] we view that issue as more suitably addressed in the broader rulemaking on permanent USF rule changes. Accordingly, we do not recommend that the Commission adopt this means of implementing an indexed cap.

51. We recommend that the Commission adopt Option 2B, which combines the advantages of both of the other alternative approaches. It would limit potential adverse effect upon the highest cost study areas as well as avoid the risk of volatility.[101] In addition, it affords certainty regarding the total USF level during the two-year interim period.

52. We are convinced that adoption of Option 2B, on an interim basis, will not undermine the goals underlying the USF rules. The differences between 1994 assistance per loop under the current rules and under Option 2B is extremely small and, in our opinion, have no potential to affect adversely the continued availability of local telephone service at reasonable rates. We base our determination upon review of the data submitted in response to the *Interim Notice*[102] as well as information in NECA's annual USF data filings.[103] Approximately 90 percent of all recipients who would receive increased assistance per loop in 1994 under the current USF rules would still receive increased assistance under Option 2B, only to a slightly lesser degree. Similarly, recipients who would receive decreased assistance per loop in 1994 under the current USF rules would experience a slightly greater decrease under Option 2B.[104]

53. The index factor proposed under Option 2B will produce stable, moderate rates of USF growth throughout the interim period. We believe that the Commission's proposal to allow a moderate rate of overall USF growth can meet the goal of facilitating change in the USF rules while allowing USF recipients some opportunity to receive additional assistance during the interim period. Using growth in total working loops as the index factor would ensure moderate growth, is readily verifiable, and, finally, recognizes that growth in the number of telephone loops may increase the need for USF assistance.[105]

3. Additional Issues

54. *Comments.* The comments contain a number of proposals that go beyond the scope of the issues delineated in the *Interim Notice*. For example, several commenters propose that large LECs be excluded from the USF assistance program or that USF growth be moderated by adjusting USF assistance only for carriers serving more than 200,000 access lines.[106] In opposition, other parties submit that large LECs also serve high cost areas and thus require high cost assistance.[107] Additional proposals include the exclusion of corporate overhead expenses from the costs used to determine USF assistance[108] and the establishment of a minimum local rate as a prerequisite for USF assistance.[109]

55. *Discussion.* While proposals such as those described above may merit consideration for inclusion in the Commission's notice of proposed rulemaking on permanent USF rule changes, we believe that these issues exceed significantly the limited scope of this proceeding to address interim rule changes. Accordingly, we do not recommend that the Commission adopt any of these proposals at this time.

C. Procedural Issues

1. Adequacy of Notice of Proposed Interim Rules

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[95] *E.g.*, AT&T Reply at 7; GCI at 3; GVNW at 8-9.
[96] MCI Reply at 14.
[97] US West Reply at 2.
[98] *See* GVNW Comments at 6 and 10; Citizens at 3; NTCA at 13; OPASTCO Reply at 8; OTC Reply at 2; and ITAG Reply at 6.
[99] GVNW at 8; NECA at 13; NRTA at 5; NTCA at 14; OPASTCO at 5.
[100] *See* discussion, *infra* at III.B.3.
[101] *See* discussion *infra* at ¶ ¶ 34-35.
[102] *See, e.g.*, NECA Appendix B.
[103] Submitted pursuant to 47 C.F.R. §36.613 (1992).
[104] Information submitted by NECA indicates that for 1994 the approximate maximum difference between USF assistance under the current rules and under option 2B will be 18 cents per loop per month. If circumstances change to the extent that certain recipients would experience a significant adverse impact per loop per month, we encourage those recipients to submit waiver requests for consideration by the Commission. NECA at Appendix B.
[105] In order to assure that the total USF, including administrative costs and all adjustments for present and past periods, does not grow beyond the indexed cap, it may be necessary to adjust the threshold periodically during the year.
[106] MCI at 13; ICORE at 3; ITCs at 6; TCA Reply at 3.
[107] *See, e.g.*, BellSouth Reply at 8-9; Nynex Reply at 2.
[108] MCI at 22.
[109] ACRS at 4-5; USTA Reply at 4.

56. *Comments.* Several commenters challenge the adequacy of the notice given by the Commission with respect to the proposed interim rules.[110] They allege that the length of time provided for the submission of comments was inadequate and, therefore, that interested parties were not afforded adequate opportunity to comment.

57. *Discussion.* A notice released by a federal agency must be sufficient "to fairly apprise interested parties of the issues involved, so that they may present responsive data or arguments."[111] The Administrative Procedure Act does not, however, specify a minimum period of time for submission of written comments.

58. In this case, the *Interim Notice* provided an opportunity for comment before adoption of interim rules, with initial comments due 22 days after release of the *Interim Notice* and an additional eight days for the submission of reply comments. We believe that the record demonstrates that there has been ample opportunity for comment upon the issues raised in the *Interim Notice.* The proposals, as presented in the *Interim Notice,* were clear and unambiguous. The parties contesting the length of the comment period,[112] as well as numerous additional parties, took full advantage of the opportunity to present their views to the Commission and to this Joint Board. A total of 69 comments, a number of them lengthy and containing significant financial analysis of the effects of the proposed options, were received.[113] The issues presented for comment were simple and straightforward, and the commenters demonstrated no difficulty in analyzing the options and in responding, even to the extent of proposing variations on the initial proposals.

59. Moreover, a wide variety of viewpoints was ably represented by numerous commenters. Most small telephone companies supported the comments of various LEC trade associations, some of which submitted extensive comments in these proceedings.[114] In addition, a number of consulting firms prepared and submitted comments on behalf of small telephone companies.[115] The views of regulators were represented not only by the members of the Joint Board and its staff[116] but also by the comments of several regulatory agencies, which took diverse positions with respect to various issues.[117] Three interexchange carriers, both large and small,[118] filed comments in response to the *Interim Notice.* We are convinced that the full range of positions with respect to the proposed interim measures was adequately developed on the record.

60. The length of time allowed for comment on the proposed rules was fully sufficient for rules that are limited in both time and scope.[119] The Commission has indicated its intention to limit the effective period of the interim rules to two years, and we recommend that this limitation be included in the interim rules.[120] Moreover, as we discussed earlier in this decision, the proposed rule change does not amount to a fundamental change in the USF rules but merely a slight modification to ensure that USF growth is moderate during the two-year interim period.

61. Finally, the Commission has stated that it will soon initiate a broad rulemaking to consider permanent changes in the USF rules.[121] Both we and the Commission have indicated that we intend to maintain open minds with respect to consideration of these issues during the permanent rulemaking.[122] Therefore, during the broader, permanent rulemaking, these interim determinations will have no precedential effect. Because of the extensive participation in the proceedings by numerous knowledgeable parties, and because the interim measures are clearly limited in scope, duration, and precedential effect, we find that sufficient notice was provided.

2. Retroactive Ratemaking Argument with Respect to Interim Rules

62. *Comments.* Several commenters argue that limiting USF growth for two years would amount to retroactive ratemaking, because the recovery of USF costs has a built-in lag of two years.[123] In opposition, MCI points out that LECs' use of historical costs to derive current rate levels does not render regulatory action regarding those rates retroactive ratemaking. The proposed rules, MCI explains, "would only affect future levels of the USF over the next two years, and would have no impact on prior period funding."[124]

63. *Discussion.* Retroactive ratemaking occurs when an agency sets rates applicable to a prior period. The interim rule changes which we recommend in this decision would not change the USF rates paid by interstate interexchange carriers during prior periods. Moreover, USF recipients are

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[110] NECA at 14; BellSouth Reply at 9; GTE Reply at 6; SBA at 10.

[111] Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).

[112] It should be noted that the Joint Board staff, at public meetings in February 1993, announced that they were considering the issues raised in the *Interim Notice.* In addition, a public workshop was held in July 1993, in conjunction with meetings of the National Association of Regulatory Utility Commissioners, to discuss these issues.

[113] In *Florida Power & Light Co. v. United States,* 846 F.2d 765, 772 (D.C. Cir. 1988), the court found "no evidence that petitioners were harmed by" a fifteen-day comment period. The court in that case noted that "[t]he Commission received sixty-one comments, some of them lengthy, addressing its proposed rule."

[114] *E.g.,* NECA and NTCA, both of which submitted voluminous comments, as well as NRTA, OPASTCO, USTA, ATA, and WITA.

[115] *E.g.,* GVNW (extensive comments), CHA, FWA, F&W, JSI, and TCA.

[116] Representing 13 different jurisdictions.

[117] Florida PSC, Idaho PUC, Illinois CC, Indiana PSC, Pennsylvania PUC, and Vermont DPS.

[118] AT&T, MCI, and GCI.

[119] *See Council of Southern Mountains, Inc. v. Donovan,* 653 F.2d 573, 582 (D.C. Cir. 1981) ("limited scope" of order influenced court's finding that Secretary of Labor possessed good cause to dispense with notice and comment).

[120] *See* GVNW at 4-5; Citizens at 2; OPASTCO Reply at 7.

[121] *Interim Notice* at 2, ¶ 4 and 5, ¶14. *See National Federal of Federal Employees v. Devine,* 671 F.2d 607, 613 (D.C. Cir. 1982) (court conditioned validity of interim regulations adopted without notice and comment upon "expeditious conduct of notice and comment procedures in good faith"), cited with approval in *Mid-Tex Electric Cooperative, Inc. v. F.E.R.C.,* 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[122] *Interim Notice* at 5, ¶ 17, and *supra* at ¶ 12.

[123] NRTA at 5; WTIA at 4; FW&A at 3; and GTE Reply at 5, n.5.

[124] MCI Reply at 12.

not precluded from recovering all of their loop costs through current or future rates. Taken to its logical extreme, the retroactive ratemaking argument would preclude any change in USF assistance that becomes effective less than two years in the future--the conventional "lag time" used by LECs and their association, NECA, in calculating USF rates.[125] We do not find merit in the retroactive ratemaking argument against adoption of interim rules to moderate USF growth, and we recommend that the Commission reject that contention.

IV. RECOMMENDING CLAUSE

64. For all of the reasons discussed in this *Recommended Decision*, this Federal State Joint Board recommends, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), that the Federal Communications Commission adopt interim rules to implement an indexed cap on growth in the Universal Service Fund. The Joint Board further recommends that these interim rules terminate after an effective period of two years. Finally, the Joint Board recommends that these interim rules have no precedential effect during the pendency of a permanent USF rulemaking, which should commence as soon as reasonably feasible.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX - LIST OF COMMENTS AND REPLY COMMENTS

COMMENTS

Alaska Telephone Association ("ATA")

Associated Communications and Research Services ("ACRS")

American Telephone & Telegraph Company ("AT&T")

BellSouth Telecommunications, Inc. ("BellSouth")

Cathey, Hutton & Associates, Inc. ("CHA")

Century Telephone Enterprises, Inc. ("Century")

Citizens Utilities Company ("Citizens")

Columbus Telephone Company, Inc. ("Columbus") (late-filed)

Cunningham Telephone Company, Inc. ("Cunningham") (late-filed)

Florida Public Service Commission ("Florida PSC")

Fred Williamson & Associates, Inc. ("FWA")

Frederick & Warinner ("F&W")

General Communications, Inc. ("GCI")

Gorham Telephone Company ("Gorham")

GTE Service Corporation ("GTE")

GVNW Inc./Management ("GVNW")

ICORI

Idaho Public Utilities Commission ("Idaho PUC")

Illinois Commerce Commission ("Illinois CC")

Indiana Utility Regulatory Commission ("Indiana URC")

ITCs, Inc. ("ITC")

ITELCO

Madison Telephone Co. Inc. ("Madison")

Matanuska Telephone Association, Inc. ("MTA")

MCI Telecommunications Corpoation ("MCI")

National Exchange Telephone Association ("NECA")

National Rural Telecom Association ("NRTA")

National Telephone Cooperative Association ("NTCA")

Northeast Florida Telephone Company, Inc. ("Northeast Florida")

Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO")

Pacific Bell & Nevada Bell ("Pacific")

Pacific Telecom, Inc. ("PTI")

Robert R. Morris ("Morris")

Rochester Telephone Corporation ("Rochester")

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[125] *See* WITA at 4 amd TCA Reply at 2.

Salina-Spavinaw Telephone Company Inc. ("Salina") (late-filed)

Southwestern Bell Telephone Company ("Southwestern")

John Staurulakis, Inc. ("JSI")

United and Central Telephone Companies ("United")

US West Communications ("US West")

United States Telephone Association ("USTA")

Vermont Department of Public Service ("Vermont DPS")

Virgin Islands Telephone Corporation ("VITELCO")

Washington Independent Telephone Association ("WITA")

REPLY COMMENTS

Arkansas Telephone Association ("Arkansas TA")

AT&T

BellSouth

Century

GCI

GTE

Independent Telephone Access Group ("ITAG")

JSI

MCI

Montana Telephone Association of Independent Companies, Inc.("MTA")

NECA

NRTA

NYNEX Telephone Companies ("NYNEX")

OPASTCO

Oregon Telephone Corporation ("OTC")

Pennsylvania Public Utility Commission ("Pennsylvania PUC") (late-filed)

Puerto Rico Telephone Company and Puerto Rico Communications Corporation ("PRTC")

PTI

Rochester

Small Business Association ("SBA")

Southwestern

Tallon, Cheeseman, & Associates, Inc. ("TCA")

United

USTA

US West

VITELCO

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 5, 1994

BELLSOUTH FILES PETITION FOR RECONSIDERATION IN CC DOCKET NO. 93-162

Pleading Cycle Established

COMMENTS: February 4, 1994
REPLY COMMENTS: February 21, 1994

On December 13, 1993, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Reconsideration of the Commission's First Report and Order in CC Docket No. 93-162 released November 12, 1993.

On November 12, 1993, the Commission issued its First Report and Order in the investigation, concluding that the local exchange carriers had not demonstrated that the overhead loadings included in their filed rates were just and reasonable. BellSouth notes that the Commission prescribed, on an interim basis, a maximum permissible overhead loading factor for expanded interconnection rates, pending further investigation. BellSouth contends that the Commission's interim prescription conflicts with the authority granted to the Commission under the Communications Act.

Interested parties may file comments on this petition for reconsideration no later than February 4, 1994. Replies should be filed by February 21, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-290

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Newton, New Jersey,
and Riverhead, New York,
in the New York, New York-
Linden-Paterson-Newark,
New Jersey, Television Market

ORDER

Adopted: January 3, 1994; Released: January 4, 1994

Reply Comment Date: January 18, 1994

By the Chief, Mass Media Bureau:

1. We now consider a Motion for Extension of Time for the filing of reply comments in the above-captioned proceeding filed on December 22, 1993, by WLIG-TV, Inc.("WLIG"), licensee of Television Station WLIG-TV, Riverhead, New York, and proponent of the amendment of Section 76.51 of the Rules to include Riverhead in the subject market. The deadline for filing comments in this proceeding was December 20, 1993, and reply comments are due January 4, 1994.

2. WLIG states that although comments were all filed on December 20, 1993, copies were not received by counsel until December 21 and 22. Seven sets of comments were filed. WLIG contends that the comments respond to a number of issues raised in the *Notice of Proposed Rule Making*,[1] which must be studied and addressed. Although WLIG has begun that process, it requests, noting the intervention of two Federal holidays, the press of other year-end responsibilities, and pre-existing vacation schedules, an additional nine business days, until January 18, 1994, to file its reply comments. Inasmuch as this proceeding was initiated, in part, by WLIG, it urges that the additional time will foster the paramount public interest in the development of a full public record for the Commission's decision.[2]

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time for filing comments in rule making proceedings shall not be routinely granted. However, we note that the *Notice of Proposed Rule Making* raises numerous issues concerning adjustments to particularly large and complex television markets, and therein we specifically state our desire for additional information to develop a comprehensive record before deciding these matters. Thus, it appears reasonable to provide the commenting parties additional time to analyze and address these issues. Therefore, we will extend the deadline for filing reply comments in this proceeding to January 18, 1994.

4. Accordingly, IT IS ORDERED, that the Motion for Extension of Time filed by WLIG-TV, Inc. IS GRANTED, and the time for filing reply comments in this proceeding IS EXTENDED to January 18, 1994.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] 8 FCC Rcd 8136 (1993)..

[2] WLIG states that counsel for Mountain Broadcasting Corporation, the other original petitioner in this proceeding, has indicated no objection to the requested extension. Further, counsel for those filing comments in this proceeding have indicated no objection to WLIG's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Permissible Services of U.S.-Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT)	File No. ISP-93-010

ORDER

Adopted: December 6, 1993; Released: January 6, 1994

By the Commission: Commissioners Quello, Barrett, and Duggan, with Chairman Hundt not participating.

1. The Commission is hereby implementing additional changes in the scope of permissible operations of international separate satellite systems. Our action herein is in response to actions taken by INTELSAT and the Executive Branch in further expanding the scope of operation of international separate satellite systems.

2. At its meeting held November 3-6, 1992, the INTELSAT Assembly of Parties determined that the provision of switched services up to the level of 1,250 64-kbps equivalent circuits per satellite over separate international satellite systems would not cause significant economic harm to the INTELSAT system. Consistent with INTELSAT's actions, the Executive Branch has further modified the separate satellite systems policy. In a letter dated January 8, 1993, the Executive Branch notified the Commission that it had modified some of the criteria articulated in the November 27, 1991 letter which set forth the scope of permissible services that could then be provided over separate systems (including 100 64-kbps equivalent circuits per satellite system) and further modified the Separate Systems policy to permit the provision of private line circuits interconnected to the public switched network (PSN).[1] The Executive Branch has now determined that interconnection of international separate satellite systems to the PSN at a level up to 1,250 64-kbps equivalent circuits per satellite for the provision of public switched services is consistent with U.S. telecommunications and foreign policy interests.[2] In light of these circumstances, we find that permitting U.S. separate satellite systems to provide up to 1,250 64-kbps equivalent circuits per satellite interconnected with the PSN for the provision of public switched services will serve the public interest.

3. Accordingly, IT IS ORDERED that, effective upon publication in the Federal Register,[3] U.S. separate satellite systems may now provide up to 1,250 64-kbps equivalent circuits per satellite for the provision of public switched services.[4]

4. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau to implement the change to 1,250 64-kbps equivalent circuits per satellite, as well as future changes in the number of circuits that may be interconnected with the PSN, subject to satisfaction of U.S. obligations under the INTELSAT Agreement.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Letter dated January 8, 1993 from Bradley P. Holmes, United States Coordinator for International Communications and Information Policy, Department of State and Gregory L. Chapados, Assistant Secretary for Communications and Information, Department of Commerce to FCC Chairman Alfred C. Sikes which references the November 27, 1991 letter from James Baker, Secretary of State and Robert Mosbacher, Secretary of Commerce to FCC Chairman Alfred Sikes. *See* Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992), *recon dismissed*, 8 FCC Rcd 5122 (1993) (*Separate Systems Modification* order), which implemented the criteria set forth in the Executive Branch's November 27, 1991 letter.

[2] Prior to this modification, international separate satellite systems could provide up to 100 64-kbps equivalent circuits per system. *See* letter dated December 14, 1990 from Thomas J. Murrin, Deputy Secretary of Commerce and Lawrence S. Eagleburger, Deputy Secretary of State to FCC Chairman Alfred C. Sikes.

[3] *See* 5 U.S.C. § 553 (a)(1) (exempting foreign affairs matters) and 5 U.S.C. § 553 (d)(1) (a rule relieving a restriction not subject to 30-day effective date requirement).

[4] In light of the foreign policy objectives underlying the establishment of international separate satellite systems, as reflected in the January 8 letter, modification of the level of switched circuits that can be provided via a separate satellite system from the current 100 64-kbps equivalent circuits per system to 1,250 64-kbps equivalent circuits per satellite can be effected without notice and comment. *See* 5 U.S.C. § 553 (a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECHARGE, INC.
d/b/a ONCOR COMMUNICATIONS, INC.,
Complainant,

v.

PACIFIC TELESIS GROUP (and Pacific Bell and Nevada Bell),
Defendants.

File No. E-93-067

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

ORDER

Adopted: January 11, 1994; Released: January 21, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. The parties to the above-captioned proceeding[1] have filed a joint motion to dismiss with prejudice all claims in the complaint relating to the Defendant's primary interexchange carrier freeze practices.[2] The parties state that they have reached agreement on the allegations contained in the complaint. The parties also state that the Complainant may wish to refile claims in the complaint regarding the Defendant's "Customer Name and Address" policy at a future time and jointly request that such claims be dismissed without prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE TO THE EXTENT INDICATED HEREIN and that the proceeding IS TERMINATED.

[1] International Telecharge, Inc. d/b/a Oncor Communications, Inc. (Complainant) and Pacific Telesis Group (Pacific Bell and Nevada Bell) (Defendant).
[2] Joint Motion to Dismiss, filed January 5, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access — **CC Docket No. 93-162**

Expanded Interconnection with Local Telephone Company Facilities — **CC Docket No. 91-141**

Pacific Bell Request for Waiver of Section 64.1401(c)(1) of the Commission's Rules

ORDER

Adopted: January 5, 1994; Released: January 5, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. Pacific Bell filed, on December 29, 1993, a motion for extension of time in which to file a virtual collocation tariff as required by the Bureau's *December 28 Order*.[1] Under the terms of that Order, Pacific Bell's virtual collocation tariff is due January 7, 1994. Pacific Bell asserts that time which must be devoted to other matters at this time makes it difficult to comply with this deadline, and requests that the date for submission of its virtual collocation tariff be extended until February 4, 1994.[2]

2. The Common Carrier Bureau has reviewed the motion filed by Pacific Bell and has determined that good cause has been shown to extend the period for filing virtual collocation tariffs. We are not persuaded, however, that the difficulties cited by Pacific Bell justify an extension greater than 14 days.

3. Therefore, IT IS ORDERED that Pacific Bell SHALL FILE tariff revisions to comply with the *December 28 Order*, on no less than 45 days' notice, no later than January 21, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, DA 93-1545 (released December 28, 1993) (*December 28 Order*).

[2] Pacific Bell Motion at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Tariff F.C.C. No. 12
Option 24

ORDER

Adopted: January 5, 1994; Released: January 5, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 30, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing revises a service agreement between AT&T and the initial Option 24 customer to increase the minimum annual charge, and adds an Optional Feature Volume Pricing Plan and a Revenue Stimulation Plan. The transmittal is currently scheduled to take effect on January 6, 1994.

2. On October 4, 1993, Public Service Enterprises of Pennsylvania, Inc., (PSE) filed a petition to reject Transmittal No. 5839. AT&T filed a reply on October 7.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 5839, PSE's petition, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 5839, filed by Public Service Enterprises of Pennsylvania IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nevada Bell Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 173 and 188
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal Nos. 1651 and 1675

Billing Name and Address Tariffs
of Local Exchange Carriers

ORDER

Adopted: January 4, 1994; Released: January 5, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. In the *BNA Order*,[1] the Commission required local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers. LECs were required to file tariffs for the provision of BNA information of customers with listed telephone numbers on or before September 8, 1993.[2] Several LECs filed BNA tariffs pursuant to the *BNA Order*, and all but two BNA tariffs have taken effect.[3] However, the effective dates of Nevada Bell's and Pacific Bell's tariffs were deferred to January 6, 1994, while those tariffs were examined further. On January 4, 1994, they filed revisions to these tariffs.[4]

2. On September 23, 1993, Sprint Telecommunications Company LP (Sprint) filed a petition to reject or suspend and investigate the BNA tariff filings of Pacific Bell and Nevada Bell.[5] Pacific Bell and Nevada Bell (together, PacTel) filed a joint reply on October 4, 1993. Sprint maintains that Pacific Bell's expected BNA demand is substantially lower than the expected BNA demand of other LECs.[6] Sprint also criticizes Pacific Bell's tariff because it does not specifically state that BNA for 10XXX calls will be available.[7] Sprint also argues that Nevada Bell should not impose service establishment charges on telecommunications service providers who obtain BNA through billing and collection services or intrastate tariffs.[8] According to Sprint, the industry standard for BNA requests and responses is the Customer Account Record Exchange (CARE) format, and maintains that Pacific Bell and Nevada Bell should specify in their tariffs that BNA will be available in this format.[9] Sprint maintains that Pacific Bell and Nevada Bell should specify a certain number of days by which BNA orders will be filled.[10] Finally, Sprint requests Pacific Bell to state in its tariff that telecommunications service providers may provide BNA data to their own authorized billing agents.[11]

3. PacTel replies that Pacific Bell's demand estimates are based on demand for its intrastate BNA offering and its interstate contract BNA offering.[12] PacTel argues that Pacific Bell's BNA demand appears low because it offers billing and collection services under contract at reasonable prices.[13] PacTel also contends that the demand on which Pacific Bell based its BNA rates, from January 1993 to May 1993, is consistent with more recent demand data, from January 1993 to August 1993.[14]

4. PacTel claims that Nevada Bell's service establishment charge is reasonable, that it started to provide intrastate BNA in March 1993, and that Nevada Bell's interstate rates and rate structure should be set equal to each other.[15] PacTel also argues that it is necessary to set Nevada Bell's service establishment charge relatively high because it has received only one BNA order to date.[16] PacTel denies that CARE is a standard format, and asserts that several LECs use the Bell Communications Research (Bellcore) EMI/EMR format.[17] PacTel states that Pacific Bell's and Nevada Bell's tariffs include language committing themselves to working with BNA customers to develop a mutually agreeable response time.[18] They are also willing to modify their tariffs to specifically state that BNA will be available for 10XXX calls.[19]

5. We have reviewed the BNA tariff transmittals filed by Pacific Bell and Nevada Bell and revisions to those transmittals, the petitions to reject or suspend and investigate

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order*).

[2] *BNA Order*, 8 FCC Rcd at 4487 (para. 45). The tariffing requirements of the *BNA Order* did not distinguish between listed and unlisted customers. However, in the *First Reconsideration Order*, the Commission extended the deadline for filing tariffs for the provision of the BNA information of customers with nonpublished or unlisted telephone numbers to February 9, 1993. Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Reconsideration and Petitions for Stay, CC Docket No. 91-115, 8 FCC Rcd 6393 (1993) (*First Reconsideration Order*).

[3] Billing Name and Address Tariffs of Local Exchange Carriers, DA 93-1381, (Com. Car. Bur., Tariff Div., released November 16, 1993) (*First BNA Tariff Order*).

[4] Pacific Bell lowered its recurring BNA rate from $3.75 per query to $0.80. Nevada Bell lowered its recurring BNA rate from $1.25 to $0.80.

[5] Sprint also petitioned to reject or suspend and investigate the BNA tariff filings of eight other LECs. With respect to these other LECs, Sprint's petition was denied. *First BNA Tariff Order*, para. 12.

[6] Sprint Petition at 3.

[7] *Id.* App. A at 1.

[8] Sprint Petition, App. A at 4.

[9] Sprint Petition, App. A at 5.

[10] Sprint Petition, App. A at 9.

[11] *Id.* App. A at 8.

[12] PacTel Reply at 2-3.

[13] PacTel Reply at 3-4.

[14] PacTel Reply at 4-5.

[15] PacTel Reply at 7-8.

[16] PacTel Reply at 5.

[17] PacTel Reply at 6.

[18] PacTel Reply at 7. *See* Pacific Bell Transmittal No. 1651, Tariff F.C.C. No. 128, Original Page 225.1, Section 6.7.1(D); Nevada Bell Transmittal No. 173, Tariff F.C.C. No. 1, Original Page 185.4, Section 6.7.1(D)(14)(e).

[19] *Id.* at 5.

those tariffs, and the LECs' replies. We conclude that no compelling argument has been presented that these tariffs are patently unlawful so as to warrant rejection, or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by Sprint Communications Company LP, against Pacific Bell Transmittal No. 1651 and Nevada Bell Transmittal No. 173 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cincinnati Bell Telephone Company
Tariffs F.C.C. Nos. 35 and 40

Transmittal No. 636

ORDER

Adopted: January 13, 1994; Released: January 14, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On October 1, 1993, Cincinnati Bell Telephone Company (CBT) filed Transmittal No. 636 revising its Tariffs F.C.C. No. 35, Access Service and F.C.C. No. 40, IntraLATA Message Telecommunications Service (MTS).[1] By Transmittal 636 CBT intends to implement its own optional incentive regulation plan permitted in the Commission's *Regulatory Reform Order*.[2] Petitions to reject or, in the alternative, to suspend and investigate were filed on October 26, 1993, by the American Telephone and Telegraph Company (AT&T) and by MCI Telecommunications Corporation (MCI). Allnet Communications Services, Inc. (Allnet) filed a petition to reject on October 26, 1993. On November 8, 1993, CBT filed its reply to the petitions and the United States Telephone Association (USTA) filed comments in support of CBT's transmittal.

2. The *Regulatory Reform Order* permits local exchange carriers (LECs) subject to rate of return regulation to elect to participate in the optional incentive plan, beginning January 1, 1994, for an eighteen-month period.[3] Otherwise, tariffs under the plan would be effective July 1 for two-year tariff periods, commencing July 1. A LEC may elect to use the plan for its traffic sensitive rates only, or for its entire interstate operation.[4] CBT's tariff filing proposes rates for its entire interstate operations, to be effective January 15, 1994, for an eighteen-month period.

II. SUMMARY OF PLEADINGS

A. Petitions

3. AT&T and Allnet contend that the filed rates include an impermissible adjustment of CBT's historical revenue requirement to account for changes in federal tax rates. AT&T states that the *Regulatory Reform Order* permits LECs to adjust their historical costs to account for the same exogenous cost changes permitted for price cap carriers under Section 61.54(d) of the Commission's rules. In computing the costs underlying the proposed rates, AT&T argues, CBT has adjusted its historical revenue requirements to reflect the increase in the federal corporate income tax rate from 34 percent to 35 percent. AT&T argues that tax law changes are generally excluded from exogenous treatment because they do not uniquely or disproportionately affect telecommunications common carriers.[5]

4. AT&T asserts that CBT has used an unauthorized procedure that substantially understates its carrier common line demand.[6] AT&T states that the *Regulatory Reform Order* adopted a common line demand formula that is intended to share the benefits of demand growth between the LEC and its interexchange carrier customers by dividing historical growth in common line minutes of use by two to compute carrier common line rates.[7] AT&T contends that CBT has developed its carrier common line rates using an improper formula.[8]

5. Both Allnet and MCI assert that CBT must use its rates currently in effect for its initial optional incentive plan filing, *i.e.*, CBT's Annual Access Tariff Filing of April 2, 1993 (including the reallocation of general support facilities) and its Local 8 Transport Tariff Filing of September 1, 1993.[9] Specifically, Allnet and MCI argue that current rates already reflect the full transition of the subscriber plant factor, the full transition of the apportionment of local switching equipment based on dial equipment minutes, the reallocation of general support facilities and excess deferred income tax amortizations.[10]

6. Allnet and MCI allege that CBT has violated Section 61.50(h) by not providing price cap indices for current common line and traffic sensitive rates.[11] Allnet and MCI also argue that CBT has erroneously reduced its interstate intraLATA rates by more than $11 million.[12] Allnet further maintains that the rate reductions to the interstate intraLATA rates of CBT result in predatory pricing.[13] Allnet and MCI both contend that local transport rates should not be permitted in this filing because they are being considered in transmittals filed pursuant to CC Docket 91-213.[14] MCI argues that CBT has incorrectly

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[1] CBT proposed revisions to Transmittal 636 on January 11, 1994, under Application No. 108. In that filing, CBT eliminated costs associated with the one-percent increase in the federal corporate income tax and revised its common line demand calculations.

[2] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, *Report and Order*, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993), *petitions for recon. pending* (*Regulatory Reform Order*).

[3] *Id.* at 4563; *see also* 47 C.F.R. § 69.3(j).

[4] *Id.* at 4555.

[5] AT&T Petition at 6, *citing* Policy and Rules for Rates of Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, 6808 (1990); Allnet Petition at 3.

[6] *Id.* at 8-9.

[7] *See Regulatory Reform Order*, 8 FCC Rcd at 4554.K

[8] AT&T Petition at 8, *citing* CBT Description and Justifications, Section 3.3.3, page 7 and TRP Table DMD-6, page 1.

[9] MCI Petition at 4-8; Allnet Petition at 4-5 and 7.

[10] *Id.*

[11] Allnet Petition at 2-3; MCI Petition at 8-9.

[12] Allnet Petition at 4-6; MCI Petition at 9-10.

[13] Allnet Petition at 6-7.

[14] Allnet Petition at 7; MCI Petition at 10.

included special access and interexchange rates in its optional incentive regulation plan filing in contravention of Section 51.50(a) of the Commission's rules.[15]

B. Reply and Comments

7. CBT asserts that initial rates under the optional incentive plan are not those approved in the most recent annual access filing. It contends that the *Regulatory Reform Order* states that initial rates shall be based on cost of service studies and demand for the most recent 12-month period, that CBT used such historical data, and, therefore, its rates are in compliance with the order. CBT also asserts that it correctly included special access and interexchange services under the optional inventive regulation plan, in accordance with the *Regulatory Reform Order*. According to CBT, the order specifically did not mandate the use of an index to track carrier prices.[16] CBT also argues that its local transport restructure rates fully comply with the Commission's *Transport Orders*[17] and are based on historical costs.[18]

8. CBT contends that its reduction in interstate intraLATA rates is not exogenous, but results from retargeting to the authorized rate of return in compliance with the *Regulatory Reform Order*. Specifically, CBT states that it has removed costs for contractual arrangements, billing and collection agreements and included imputed access charges recovered from end users through the interstate intraLATA MTS rate. Responding to MCI's claim that the adjustment should be apportioned among all four service baskets, CBT asserts that the costs are strictly non-access costs.[19]

9. CBT argues that its interstate intraLATA toll rates are not predatory as Allnet alleges. CBT notes that Allnet cites a single rate element, the additional per-minute night rate for the 11-22 mileage band, as being set too low. CBT maintains that its rates comply with Commission rules and that it arrived at its interstate intraLATA rates by applying a rate adjustment factor to preserve the existing rate relationships. CBT asserts that its rates were developed to recover fully distributed costs, and that viewed as a whole, the rates meet this test.[20]

III. CONCLUSION

10. We have reviewed the optional incentive plan tariff transmittal filed by CBT, the petitions to reject or suspend and investigate those tariffs, the reply of CBT and the supporting comments of USTA. We conclude that no compelling argument has been presented that this tariff is patently unlawful so as to warrant rejection, or that an investigation is warranted at this time.

11. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate Cincinnati Bell Telephone Company's Transmittal No. 636, filed by American Telephone and Telegraph Company and by MCI Telecommunications Corporation ARE DENIED.

12. IT IS FURTHER ORDERED that the petition to reject Cincinnati Bell Telephone Company's Transmittal No. 636, filed by Allnet Communications Services, Inc., IS DENIED.

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[15] MCI Petition at 8.

[16] *Id.* at 9-11.

[17] Transport Rate Structure and Pricing, 7 FCC Rcd 7006 (1992)(*Transport Order); recon.*, 8 FCC Rcd 5370 (1993)(*First Reconsideration Order); further recon.*, 8 FCC Rcd 6233 (1993)(*Second Reconsideration Order); further recon. pending,* (collectively, *Transport Orders).*

[18] CBT Reply at 13. CBT's transport rates became effective on January 1, 1994. Transmittal 636 is consistent with its transport tariff.

[19] *Id.* at 12-13.

[20] *Id.* at 18.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 18, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Copley, Joe A. - Request for refund of a hearing fee for a new FM station at Beech Mountain, North Carolina - **Granted** (November 30, 1993).

Denise Broadcasting, Inc. - Request for refund of a hearing fee for a new FM station at Lake Havasu City, Arizona - **Granted** (December 14, 1993).

Elgar Partnership - Petition for review of application on behalf of Elgar Partnership; WHF, Inc.; JDG, Inc.; LDG, Inc. and Sol Schildhause - **Denied** (April 26, 1993).

Johnson, Robert - Request for refund of a fee filed for a ship inspection at Hanalei, Kauai, Hawaii - **Denied** (December 01, 1993).

KREL, Inc. - Request for refund of a hearing fee for a new FM station at Los Alamos New Mexico - **Granted** (November 30, 1993).

Ladson Star Radio - Petition for reinstatement of an application for a new FM radio broadcast station at Ladson, South Carolina - **Denied** (December 16, 1993).

North American Broadcasting - Request for refund of a filing fee for an AM station at Providence, Rhode Island - **Granted** (December 9, 1993).

ProRadio Inc. - Request for refund of a hearing fee for a new FM station at New London, Missouri - **Granted** (December 1, 1993).

Rochlis, Jeffrey A. - Request for refund of a hearing fee for a new FM station at Los Almos, New Mexico - **Granted** (November 30, 1993).

Sattler Broadcasting - Request for refund of a filing fee for a FM station at East Ridge, Tennessee - **Granted** (December 14, 1993).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 30 1993

Stephen T. Yelverton, Esq.
McNair & Sanford, P.A.
Madison Office Building
Suite 400
1155 15th Street, N.W.
Washington, D.C. 20005

Re: Joe A. Copley
New FM Station
Beech Mountain, North Carolina
Fee Control # 9207088170373002

Dear Mr. Yelverton:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 14 1993

Susan V. Sachs, Esquire
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Suite ~~300~~ 200
Washington, D.C. 20036-1573

Re: Denise Broadcasting, Inc.
New FM Station
Lake Havasu City, Arizona
Fee Control # 9210298170395001

Dear Ms. Sachs:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ELGAR PARTNERSHIP

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton. NY. State College. PA and Lake Placid. FL service areas and on the F-Group channels to serve the Augusta. ME. Newport. OR and Fairbanks. AK service areas

In re Applications of

WHF. INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton. NY. State College. PA and Lake Placid. FL service areas and on the F-Group channels to serve the Augusta. ME. Newport. OR and Fairbanks. AK service areas

In re Applications of

JDG. INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton. NY. State College. PA and Lake Placid. FL service areas and on the F-Group channels to serve the Augusta. ME. Newport. OR and Fairbanks. AK service areas

In re Applications of

LDG. INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton. NY. State College. PA and Lake Placid. FL service areas and on the F-Group channels to serve the Augusta. ME. Newport. OR and Fairbanks. AK service areas

In re Applications of

SOL SCHILDHAUSE

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton. NY. State College. PA service areas and on the F-Group channels to serve the Augusta. ME service area

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 26, 1993

By the Commission:

1. The Commission has under consideration an Application for Review jointly filed on behalf of Elgar Partnership: WHF. Inc.: JDG. Inc.: LDG. Inc. and Sol Schildhause (Applicants). Applicants seek review of the Managing Director's decision that denied reconsideration of the Commission's action returning their applications for various MMDS facilities.[1]

2. The applications in question were dismissed for failure to submit a separate FCC Form 155 and check with each individual MMDS application. Instead. each Applicant submitted a single Form 155 and a single fee payment to cover all of its applications for proposed MMDS facilities in as many as six separate markets. Because this filing method violated the Commission's procedures implemented to ensure the efficient processing of fees. the Managing Director denied Applicants' request for reinstatement of their applications.

3. On review. Applicants claim that confusion surrounded the implementation of the fee program. and therefore the Managing Director should have reinstated their applications. They claim that the rules were unclear. particularly the provisions relating to the consolidation of fees on a single Form 155 ("fee multiples"). and that a liberal application of the fee rules in this instance was warranted. Applicants also claim that the Managing Director should have considered their misplaced reliance on erroneous information that they contend was received from the Commission's "Fees Hotline." Finally. Applicants contend that dismissal of their applications was unduly harsh and that reinstatement will serve the public interest.

4. Upon consideration of Applicants' arguments. we conclude that their Application for Review should be denied. Contrary to Applicants' claim that the applicable rules were confusing. at the time Applications filed their applications.[2] the fee rules regarding the FCC Form 155 requirement stated clearly that "|e|ach application or other filing...must be accompanied by a remittance in the full amount of the fee due and FCC Form 155." 47 C.F.R. § 1.1107(a): *Memorandum Opinion and Order in Establish-*

[1] Applicants also seek reinstatement *nunc pro tunc* of their applications.

[2] Applicants were required to file their applications before the filing window closed on May 29. 1990. *Public Notice*. Report No. D-553. released March 28. 1990.

ment of a Fee Collection Program, 5 FCC Rcd 3558, 3569 ¶24 (1990)(*Fee Order*) ("A separate Fee Form will be required for each distinct application"). Finally, the rules made clear that the penalty for noncompliance was dismissal: "[a]pplications or requests subject to fees that are submitted without the FCC Form 155 will be dismissed." 47 C.F.R. § 1.1107(a)(2).

5. Moreover, the Commission also had explicitly set forth the circumstances in which a single Form 155 covering multiple fees could be used. 5 FCC Rcd at 3569 ¶24. In this regard, the *Fee Order* stated:

> A separate Fee Form will be required for each distinct application, but, where a single application can be used to request multiple licenses, stations, or frequencies, a single Fee Form, accompanied by a single payment, will suffice.

Id. Those circumstances clearly did not apply to the applications in question.

6. In addition, prior to the effective date of the rules, the Commission had conducted an informational campaign to instruct the public about the revised fees and filing procedures. This consisted of a series of public notices and a public workshop that was held on April 24, 1990, one month before the Applicants filed their applications. Review of the videotape of this workshop reveals that use of the new Form 155 and the circumstances in which "fee multiples" could be used were discussed in detail. Nevertheless, as evidence of the purported confusion, Applicants emphasize that additional instructional measures were taken after the fee program was fully operational and after the subject applications were filed. However, merely because the Commission subsequently issued public notices and held public meetings concerning fee multiples does not in any way establish that the filing requirements were unclear at the date these Applicants filed their applications.[3]

7. Applicants further contend that the Managing Director failed to address their reliance upon erroneous advice that counsel for Applicants received from the Commission's "Fees Hotline." However, after reviewing the matter carefully with the staff, we are satisfied that Applicants were not in fact given erroneous information by the staff and that any miscommunication that may have occurred was not the fault of the Commission or its personnel.[4]

8. Finally, we do not agree that it would serve the public interest to ignore the Form 155 rule in this interest and reinstate the subject applications. The Commission expressly stated in implementing the use of FCC Form 155, that "[b]ecause the Fee Form is essential to the efficient processing of fees, the failure to submit the form will result in the dismissal of the underlying application." *Fee Order*, 5 FCC Rcd at 3569 ¶25. With the expected three-fold increase in feeable applications occasioned by the new Schedule of Charges set forth in the *Fee Order*, the Commission sought to utilize the "most cost-efficient method of cash management in collecting fees" and "to ensure the rapid deposit of funds." *Id.* at 3561 ¶ 6. The Form 155 requirement was a critical and necessary part of achieving these objectives, as it would make it possible for the lockbox bank to make the initial determination of whether the correct fee had been paid without reading the underlying materials and would permit the creation of a data base containing a complete record of payments. *Id.* at 3569 ¶22. The Commission's interest in maintaining the integrity and efficiency of its fee collection program through strict enforcement of this requirement is thus not outweighed by Applicants' claim that the consequences are unduly harsh, particularly since the rules are clear both as to the general "one fee and Form 155 per application" requirement and the consequences for failure to comply.

9. For the foregoing reasons, we affirm the Managing Director's action dismissing Applicants' MMDS applications for failure to submit FCC Form 155. Accordingly, IT IS ORDERED, that the Application for Review of the Managing Director's February 27, 1991 decision filed by Elgar Partnership; WHF, Inc.; JDG, Inc.; LDG, Inc. and Sol Schildhause is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] Applicants cite the Commission's *Public Notice*, Mimeo No. 4092, released July 20, 1990 as an indication that confusion existed concerning fee multiples. This document included a "detailed listing of fee type codes that will accept the use of multiples." *Id.* We note that on July 6, 1990 the Commission also issued a Public Notice in which the rules expressly were "*modified* to permit the filing of a single FCC Form 155 and single check along with a series of applications that form a 'system.'" *Public Notice*, "Part 21, Point-to-Point Microwave Fee Filing Procedures Modified," July 6, 1990 (emphasis added). These changes, which occurred well after the subject applications were filed, "modified," rather than "clarified" the rules, and, in any event, had no effect on the procedures that apply to the subject applications.

[4] In their petition for reconsideration, Applicants submit an affidavit stating that a legal assistant associated with counsel for Applicants was informed by a Fees Hotline representative that the use of fee multiples for MMDS applications for different markets was permitted. Applicants explain that following return of their applications, the legal assistant met with a Hotline supervisor and was told that MMDS applications do not qualify for the fee multiple rule and that each different application must be accompanied by a separate Form 155 and separate check. The affidavit goes on to imply that the Hotline supervisor suggested a reason why misinformation had been provided: "[i]t was determined that the Fee Hotline representative had misunderstood that [Applicants] intended to file for six *different* markets and had, therefore, given . . . incorrect instructions." Petition Appendix 2 at para. 7 (emphasis in original). In fact, the Hotline supervisor who discussed the particular incident did not in any way agree that an error had been made by FCC hotline staff or that any alleged erroneous advice was the result of a misunderstanding. The supervisor, who subsequently questioned the staff involved concerning the incident, was informed by the staff that the legal assistant, who was well known to the FCC staff, had been in a hurry when he asked the question. The legal assistant was told that fee multiples probably could not be used but the staff would check with a supervisor. When the staff person returned to the line after checking, the legal assistant was gone. Hence, there was no misunderstanding on the part of the Hotline representative as to the nature of the legal assistant's question, nor did the representative provide erroneous information.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 01 1998

Mr. Robert Johnson
P.O. Box 567
Hanalei, Kauai, Hawaii 96714

Dear Mr. Johnson:

This is in response to your request for a fee refund involving the ship radio inspection of your vessel, the Captain Napoli, a commercial vessel.

You state that radio inspection has been postponed several times by mutual agreement because you have been unable to obtain a commercial operating license. In view of the lengthy delay that you have encountered, and your view that additional time will be required, you request a refund of the inspection fee.

Unfortunately, after a careful review of this matter, I can find no basis within the Commission's rules upon which to justify a grant of your request. Section 1.1111 of the Commission's rules makes no allowance for refund of a fee payment upon withdrawal of an application, including an application for a ship radio inspection. See 47 C.F.R. § 1.1111. Moreover, the Commission has explicitly stated that a refund will not be granted once an application has cleared the fee review process, regardless of its disposition. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 949 (1987), Recon. denied, 3 FCC Rcd 5987 (1998).

Accordingly, your request is denied. However, your application will be retained in the Commission's files. Should you later determine to proceed with the ship radio inspection, present a copy of this letter together with your application to the appropriate Commission office so that you will avoid any additional fee payment.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 30 1993

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Re: KREL, Inc.
New FM Station
Los Alamos, New Mexico
Fee Control # 9301078170412001

Dear Mr. Smithwick:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 1 6 1993

A. Wray Fitch III, Esq.
Gammon & Grange
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102-3807

Dear Mr. Fitch:

This letter responds to your petition for reconsideration, filed on behalf of Ladson Star Radio (Ladson Star), seeking reinstatement of its application for a new FM radio broadcast station at Ladson, South Carolina. Your petition is opposed by Thomas B. Daniels, another applicant in this proceeding.

Ladson Star's application was dismissed for failure to pay the hearing fee on time. The relevant hearing fee deadline for applicants in this proceeding was February 24, 1993, as established in Public Notice, Report No. NA-165 (December 21, 1992) (Public Notice). Prior to the fee deadline, the Chief, FM Branch notified Ladson Star that its application suffered from tender and acceptance defects and gave Ladson Star 30 days to remedy all such defects or its application would be dismissed. See Ltr. Ref. 1800B3-CEF, dated January 26, 1993. On February 24, 1993, the deadline for paying hearing fees, Ladson Star sent a letter to the Commission explaining:

> Because the Ladson Star Radio application was inadvertently accepted for filing, Ladson Star Radio is not today submitting its hearing fee, but will do so on acceptance of its application for filing, or at the time of designation for hearing if directed to do so by the FCC.

The Chief, FM Branch subsequently dismissed Ladson Star's application. See Ltr. Ref. 1800B3-JRC, dated April 12, 1993.

In support of your petition, you contend that Ladson Star had no assurance that its application would be accepted and designated for hearing; therefore, requiring Ladson Star to tender its hearing fee contravened the rationale for requiring early payment of hearing fees as explained by the Commission in Proposal to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 157 (1991) (Comparative Hearing Reform). You also contend that the Commission erred in dismissing Ladson Star's application, when it properly should have issued an "erratum" to the Public Notice as it did in the Whitesboro, New York proceeding, and then later placed Ladson Star's application on a separate public notice after its application was found acceptable. See Public Notice, Report No. NA-163 (released September 22, 1992), and Public Notice, Report No. NA-167 (released March 11, 1993).

In opposition, Daniels contends that Ladson Star misinterprets Commission policies regarding the timely payment of hearing fees. Daniels cites a Public Notice announcing policy changes in the processing of commercial FM broadcast applications, 5 FCC Rcd 990 (1990), wherein the Commission explained that it would issue "Notices of Acceptance for Filing" prior to the engineering review to expedite the processing of FM broadcast applications by triggering earlier the petition to deny pleading cycle. Under this policy, Daniels states that the Bureau's deficiency letter to Ladson Star was not an ultimate finding of "unacceptability," mandating the immediate dismissal of its application, but instead gave Ladson Star 30 days to amend its application to remedy the defects identified in the letter. In addition, Daniels cites the Comparative Hearing Reform decision, wherein the Commission stated that it would begin requiring earlier submission of hearing fees, after the filing of the last mutually-exclusive application, to expedite settlement negotiations. Daniels argues that both the Comparative Hearing Reform decision and the Public Notice that accepted Ladson Star's application for filing clearly stated that each applicant was required to submit the hearing fee by the required date or its application would be dismissed. Daniels contends that Ladson Star had no authority to decide not to submit its hearing fee; on the contrary, Daniels contends that Ladson Star's only choice was to pay its hearing fee in timely fashion and subsequently request a refund under Section 1.1111(c)(2) of the rules if its application was found to be "unacceptable for filing." Finally, Daniels argues that the cases in which the Commission issued an "erratum" to a public notice accepting applications for filing are factually distinct from the present circumstances.

We conclude that Ladson Star's application properly was dismissed for failure to pay its hearing fee. Section 73.3573 ("Processing FM broadcast station applications") states that a public notice announcing the acceptance of mutually exclusive applicants triggers the date for filing petitions to deny but "will also announce the date on which all mutually exclusive applicants will be required to pay the hearing fee established in part 1 of these rules, 47 C.F.R. § 1.1104(2)(c) of this chapter." 47 C.F.R. § 73.3573(g)(2)(i). In addition, Section 73.3573 contains no waivers or exceptions to allow an applicant to submit its hearing fee at a date other than that stipulated in the public notice. The Public Notice in this proceeding listed Ladson Star as an applicant and specified that the hearing fee "shall be paid no later than February 24, 1993 or the application will thereafter be dismissed." Public Notice. In addition, the Public Notice expressly stated that "[f]ailure to make the hearing fee payment in a timely manner will result in dismissal of the underlying pending application. 47 C.F.R. § 1.1107(b)." Id. (emphasis in original).

The Bureau's deficiency letter contained no language that specifically extended, modified, or suspended the hearing fee deadline for Ladson Star's application. The letter simply advised Ladson Star that its application did not comply with the contour overlap provisions of 47 C.F.R. § 73.215 or the alien-ownership provisions in 47 U.S.C. § 310(b). The letter continued:

> pursuant to 47 C.F.R. § 73.3522, . . . an applicant whose application is found to meet the minimum filing requirements but nevertheless is not complete and acceptable shall have the

> opportunity in the 30-day period specified in the FCC staff's deficiency letter to correct all deficiencies in the underlying application, including any deficiency not specifically identified by the staff.

See 47 C.F.R. § 73.3522; Processing Procedures for Commercial Broadcast Applications, 7 FCC Rcd 5074, 5081 (1992); see also 47 C.F.R. § 73.3564(a)(2). As Daniels correctly states, the letter was not an ultimate finding of "unacceptability," nor did it return Ladson Star's application for failing to meet the minimum filing requirements. See 47 C.F.R. § 73.3564(a)(2). Instead, it stated that "(f)ailure to correct all tender and acceptance defects within thirty days from the date of the letter will result in dismissal of the application . . ." Thus, Ladson Star's argument that the Bureau's letter gave it no assurance that its application would be designated for hearing is based on its incorrect interpretation of both the letter and the applicable rules.

For the same reasons, we do not agree with Ladson Star's contention that the Commission should have issued an "erratum" stating that Ladson Star's application was inadvertently accepted for filing and then later placed Ladson Star's application on a separate public notice. As explained above, the Public Notice announced the date for filing petitions to deny as well as that for submitting hearing fees, following established Commission policy that was implemented to expedite the processing of applications for new broadcast facilities. Under the circumstances, an erratum would have disrupted the orderly flow of applications processing and would have been inconsistent with precedent because the circumstances here are distinct from the cases cited by Ladson Star. In this regard, Daniels notes that one case involved an application that was inadvertently accepted for filing with an earlier-filed applicant in First Come First Served allotment. See Erratum, Report No. NA-165A, released February 19, 1993. Daniels also explains that in the Whitesboro, New York, proceeding, the Commission issued a second public notice that included as acceptable for filing an applicant that had been inadvertently dismissed by the Commission and excluded from the first notice. See Report No. NA-163, released September 22, 1993; and Report No. NA-167, released March 11, 1993. Ladson Star does not dispute Daniels' analysis of these cases in its reply.

Finally, we do not agree with Ladson Star's claim that none of the other parties in this proceeding would be prejudiced by allowing it to pay its hearing fee at a later date. The Commission adopted the requirement for early payment of hearing fees in its proceeding to expedite the comparative hearing procedures for new broadcast facilities. The proceeding was designed primarily to expedite the provision of new services to the public. The Commission thus stated that the intent of the rule was to expedite the comparative hearing process for new broadcast facilities "by [e]ncouraging more and/or earlier settlements." See Comparative Hearing Decision, 6 FCC Rcd at 157. Allowing late payment would grant Ladson Star the tactical advantage of being able to see exactly which applicants remained in the proceeding. Moreover, Ladson Star is incorrect in its claim that the Notice of Appearance deadline is the critical date for paying hearing fees. The Notice of Appearance deadline was the critical date under the previous rules, which

required payment of the hearing fee by the Notice of Appearance deadline. However, because of the policy change announced in the Comparative Hearing Decision, the Notice of Appearance date is a critical date only in the sense that applicants filing a settlement agreement to qualify for a hearing fee refund must file the agreement by that date. See 47 C.F.R. § 1.1111(c)(4). In sum, Ladson Star should have paid its hearing fee on time and then pursued a refund of its fee if its application subsequently was dismissed.

Accordingly, your request for reinstatement is denied.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 9 1- 3

Richard J. Hayes, Jr., Esquire
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553

Dear Mr. Hayes:

This will respond to your request for refund of a filing fee submitted in connection with the transfer application of Frank E. Battaglia, owner of North American Broadcasting Company, Inc., licensee of WALE-AM, Providence, Rhode Island.

You state that Mr. Battaglia resubmitted his transfer application, with the appropriate form and the appropriate fee, because the first application utilized an obsolete form and was therefore returned. Thus, Mr. Battaglia had submitted two applications with two separate fee payments, but only one application was processed. Therefore, you request a refund of the second fee payment. It would appear that, under the circumstances, refund of the second fee payment is warranted. See 47 C.F.R. §§1.1107(d); 1.1111(a)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $565.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 01 1993

Gregg P. Skall, Esq.
Louise Cybulski, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Skall and Ms. Cybulski:

This will respond to your request for refund of a hearing fee filed on behalf of ProRadio, Inc. in connection with its construction permit application for a new FM station at New London, Missouri.

You state, and our records reflect, that the other mutually exclusive application was returned as unacceptable for filing. Therefore, the need for a comparative hearing has been obviated, and refund of the hearing fee is warranted. See 47 C.F.R. §1.1111 (b)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OFFICE OF
MANAGING DIRECTOR

NOV 30 1993

Lewis J. Paper, Esq.
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Re: Jeffrey A. Rochlis
New FM Station
Los Alamos, New Mexico
Fee Control # 9301068170410001

Dear Mr. Paper:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above referenced submission (§1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission has adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

DEC 16 1993

William H. Crispin, Esq.
Verner, Liipfert, Bernhard,
McPherson and Hand
901-15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

Dear Mr. Crispin:

This will respond to your request for refund of a filing fee submitted on behalf of Sattler Broadcasting ("Sattler") in connection with its Form 302 application.

You state, and our data base reflects, that Sattler submitted two applications with two separate fee payments, but that only one application was forwarded to the Commission for processing. Therefore, you request a refund of the second fee payment. Under the circumstances, refund of the second fee payment is warranted. See 47 C.F.R. §1.1111(a)(1).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $470.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 93-1411

News media information 202/632-5050. *Recorded listing of releases and texts 202/632-0002.

November 19, 1993

FCC ANNOUNCES PROCEDURES FOR IMPLEMENTATION OF EXCLUSIVITY ON 929-930 MHZ PAGING FREQUENCIES

On October 21, 1993, the Commission adopted a Report and Order amending its rules governing 929-930 MHz private paging to grant channel exclusivity to qualified local, regional, and national paging systems. Report and Order, PR Docket No. 93-35, FCC 93-479 (adopted October 21, 1993, released November 17, 1993). The Report and Order provides that on 35 of the 40 929-930 MHz frequencies, paging systems consisting of six or more transmitters and meeting certain other specifications are entitled to local protection against future co-channel systems in most markets, and larger systems that meet specified conditions are eligible for similar protection on a regional or nationwide basis. The Report and Order further provides that all 929-930 MHz authorizations granted under the prior rules are grandfathered, and that exclusivity will be granted to incumbents who are operating or constructing systems authorized under the prior rules that comply with the new exclusivity requirements. For this purpose, an "incumbent" is defined as (1) any 929-930 MHz licensee whose authorization was granted on or before October 14, 1993, or (2) any 929-930 MHz applicant whose application was filed with the Commission on or before October 14, 1993.

By this Public Notice, the Commission announces procedures by which incumbents may request exclusivity as described above. Any incumbent that seeks to qualify for exclusivity shall submit a request for designation of exclusive status to the 929-930 MHz frequency coordinator, the National Association of Business and Educational Radio, Inc. (NABER), 1501 Duke Street, Suite 200, Alexandria, VA 22314. The request shall provide information demonstrating that the incumbent's existing or proposed paging system meets the exclusivity requirements set forth in the Report and Order. For the convenience of incumbents requesting exclusivity, NABER has prepared a form that may be used for this purpose. Requests should be submitted to NABER as soon as possible, but no later than January 28, 1994. NABER will review all submissions for compliance with the exclusivity criteria, after which the requests will be forwarded to the Commission for final review and approval.

The Commission is continuing to accept new 929-930 MHz applications for filing. Such applications must be submitted initially to the 929-930 MHz frequency coordinator. On the 35 designated channels, all such applications filed with the Commission after October 14, 1993 must comply with the new exclusivity rules, and new applicants are required to provide information demonstrating compliance as part of their submission to the coordinator. Applicants are advised that new applications may not be processed by NABER or the Commission until all pending exclusivity requests from incumbents have been decided.

For further information, please contact NABER at (703) 739-0300 (Contact: Don Vasek), or David L. Furth, Private Radio Bureau, Policy and Planning Branch, (202) 634-2443.

--FCC--

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-522
Washington, D.C.

In the Matter of	)
	)
Petition for Waiver	)
of the Commission's Rules to Recover	)
Network Depreciation Costs	)

ORDER

Adopted: November 29, 1993; Released: December 8, 1993

By the Commission: Commissioner Barrett issuing a separate statement.

I. BACKGROUND

1. On November 19, 1992, United Telephone - Southeast (United) [1] filed a petition for waiver of Section 61.45 (d) of the Commission's Rules, 47 C.F.R. § 61.45 (d), which limits exogenous cost changes under price caps to eight specific items. United requests that the Commission extend exogenous treatment to amortization costs resulting from the Tennessee Public Service Commission's (TPSC) requirement that it prematurely retire four central office switches in the company's Tennessee study area.

2. On January 15, 1993, comments in support of United's petition were filed by BellSouth Telecommunications, Inc. (BellSouth), GTE Service Corporation (GTE); New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), Pacific Telesis (PacTel), Southwestern Bell Telephone Company (SWBT), the United States Telephone Association (USTA) and the Tennessee Public Service Commission (TPSC). Oppositions were filed by American Telephone and Telegraph Co. (AT&T), MCI Telecommunications Corp. (MCI) and the International Communications Association (ICA). Reply comments were filed on January 29, 1993 by United, BellSouth, GTE, MCI, AT&T, the TPSC and the National Association of Regulatory Utility Commissioners (NARUC). For the reasons set forth below, we deny United's petition for waiver of our rules.

II. SUMMARY OF PLEADINGS

A. Petition

3. United states that the early replacement of these switches was ordered by the TPSC as part of its ten-year Technology Deployment Master Plan (Master Plan) to deploy digital switching and fiber optic transmission technologies in Tennessee's local telephone

[1] United Telephone - Southeast encompasses United Telephone - Southeast in Tennessee and Virginia, and United Company of the Carolinas in South Carolina.

networks.[2] United states that as a result of this regulatory mandate, it will incur an incremental amortization expense of $6,743,336 on a total company basis, of which the interstate assignment is $900,994. The TPSC, according to United, has developed a mechanism that allows United to recover the intrastate portions of these costs. Correspondingly, United argues, this Commission should permit it to recover the interstate assignment of the resulting costs through an exogenous increase to United's price cap formula. If granted, United would increase interstate access rates for customers in Tennessee, Virginia, and South Carolina.[3]

4. United argues that exogenous treatment of the premature switch retirement costs is appropriate under the Commission's price cap rules for several reasons. First, United argues that the TPSC has recognized that the costs of the accelerated deployment technology are outside the company's control and so has provided a mechanism for intrastate cost recovery. United seeks similar treatment from this Commission. United argues that its request that this additional expense be treated as an exogenous cost is wholly consistent with the Commission's LEC Price Cap Order, which describes exogenous costs as those "triggered by administrative, legislative or judicial action beyond the control of the carriers."[4]

5. Second, United asserts that its recovery of the remaining investment in the four switches is not a general depreciation rate change. United maintains, rather, that the costs at issue are similar to the specific amortization costs the Commission has previously recognized as exogenous. United acknowledges that the Commission has held that general depreciation rate changes are endogenous under price cap rules, while repeatedly emphasizing carrier control of investment as the deciding factor.[5] United adds that the TPSC and this Commission have agreed to recognize the early retirement of the switches through a two-year "dying account amortization."[6] This accounting treatment permits United to amortize the remaining investment in the shortened lives of the central office switches that United must retire under the Master

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[2] The Master Plan contains a matrix listing each exchange of each local company, the specific type of switch serving each exchange, and the year by which certain switches must be replaced. The plan requires that ITT DSS-1210 digital switches in four of United's exchanges be replaced in order to meet SS7 service deadlines. United Petition at 3-4.

[3] United Petition at 1 & n.1, 6.

[4] United Petition at 4. See Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6809 (para. 166) (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Price Cap Reconsideration Order), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), further modified on recon., 6 FCC Rcd 4524 (1991) (ONA/Part 69 Order), appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[5] "It is the carrier, and not this Commission that decides when to employ new plant and when to retire old. It is, therefore, the carrier, and not this Commission, that primarily controls the rate at which plant investment is translated into depreciation expense." United Petition at 6, quoting Second Further Notice, 4 FCC Rcd at 3015 (para. 290).

[6] United Petition at 6, citing Exhibit C, letter dated May 4, 1992, from Kenneth P. Moran, Chief Accounting and Audits Division, Federal Communications Commission, to James B. Wright, Vice President - General Counsel and Secretary, United Telephone - Southeast, Inc.

Plan. United argues that this dying account amortization treatment is not unlike the amortization of reserve imbalances that the Commission gave exogenous cost treatment in the LEC Price Cap Order.[7] United argues that the TPSC's ordered retirement of the switches altered their forecasted service lives and salvage values and created a deficiency in the associated depreciation reserve. The two year dying account amortization is a mechanism to correct the imbalance and, thus, United reasons, the amortized costs should be given exogenous treatment.[8]

6. Third, citing the LEC Price Cap Reconsideration Order, United states that the Commission has recognized amortization of inside wire investment as an exogenous cost, reasoning that local carriers should be allowed to recoup their capitalized costs, even though a change in regulatory structure has altered the nature of the costs. In that case, United contends, exogenous treatment was based on regulatory, rather than carrier, control of depreciation expense levels.[9]

7. United also observes that the recovery of the intrastate assignment of this higher level of costs has been allowed by the TPSC in its ratemaking process, and asks that the Commission ensure that interstate customers share with state customers the costs of accelerated development of the local telephone network.[10] Finally, United argues that these costs are unique to United, are relatively moderate and are not reflected in the GNP-PI or the productivity offset. Therefore, granting United a waiver to treat this cost change exogenously is consistent with the Commission's price cap rules.[11]

B. Comments

8. All of the LECs and USTA support United's request for waiver on the grounds that the increased costs were triggered by an administrative event and therefore were beyond United's control.[12] The LECs agree with United that the costs at issue are analogous

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[7] LEC Price Cap Order, 5 FCC Rcd at 6809 (para. 185).

[8] United Petition at 7-8.

[9] United Petition at 10, citing LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2673-74 (para. 79).

[10] United notes that the TPSC has devised funding mechanisms to allow individual carriers to recover the intrastate portion of the additional costs. With regard to United, the TPSC fixed rates for United during the period January 2, 1991 and December 31, 1993 and directed that the bulk of the company's projected excess earnings be "committed to cover the cost of accelerated technology deployment and depreciation on stranded investment as described in the Technology Deployment Master Plan." United Petition at 5, citing Exhibit B, "Earnings Investigation of United Inter-Mountain Telephone Company," Tennessee Public Service Commission, Docket No. 90-07832, Order, p.2 (1992).

[11] United Petition at 9.

[12] See Pacific Bell Comments at 2; NYNEX Comments at 2; USTA Comments at 1-2; GTE Comments at 2; SWBT Comments at 4. BellSouth disagrees with United's interpretation of the Commission's price cap rules, and argues that the list of exogenous costs in Section 61.45(d) of the Rules is descriptive, not exhaustive. BellSouth Comments at 1-2.

to the amortization of inside wire investment and depreciation reserve imbalances the Commission has previously recognized as exogenous.[13] The LECs argue further that carrier control of investment decisions was the main factor in the Commission's determination that general depreciation rate changes are endogenous under price cap rules. Because the event triggering the change in United's case was mandated by state regulators, the LECs argue, exogenous treatment is appropriate.[14] Additionally, they argue that United's costs are reasonable, and the scope of the recovery is limited to recovery of the interstate portion of the additional costs, and further limited to only the incremental amortization expense, not the replacement cost of the switches.[15] United's request is consistent with the principles of price cap regulation, according to USTA, because the exogenous treatment requested by United will better enable it to bring new technologies to Tennessee.[16] NYNEX asserts that the grant of the United petition would promote federal-state coordination and cooperation regarding a modern network infrastructure common to both jurisdictions.[17]

9. The TPSC supports the waiver for the reasons advanced by United. The TPSC states that it adopted the Master Plan into its rules and made it mandatory for all regulated local exchange companies. The TPSC asserts that the Master Plan was not a company-initiated project, but rather was developed by an independent consultant who reviewed United's current network and recommended improvements which United's own engineer said were not needed.[18] The TPSC acknowledges that the Commission may hesitate in giving approval to raise price caps simply because a state regulatory agency grants increased depreciation rates, even in the name of advancing technology. Nonetheless, the TPSC argues that United's situation is unique in that Tennessee has a Master Plan that requires the deployment of specific technology, by certain dates, which in some instances requires premature retirements of switches.[19]

C. Oppositions

10. AT&T and MCI argue that United has failed to demonstrate that waiver is appropriate in this case. They maintain that a party seeking a waiver must make a showing of substantial hardship unique to the applicant, and demonstrate that deviation from the rule will not undermine the interests served by the regulation. They also argue that the Commission may

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[13] See GTE Comments at 3-4; NYNEX Comments at 2-3; BellSouth Comments at 2-3.

[14] GTE Comments at 3; accord BellSouth Comments at 3; NYNEX Comments at 3, citing LEC Price Cap Order, 5 FCC Rcd at 6809 (para. 182).

[15] USTA Comments at 2; accord BellSouth Comments at 3. Pacific Bell adds that these increased costs will not be reflected in the GNP-PI, and therefore, United has stated a prima facie case for exogenous treatment. Pacific Bell Comments at 2.

[16] USTA Comments at 2, citing LEC Price Cap Order, 5 FCC Rcd at 6790.

[17] NYNEX Comments at 4.

[18] TPSC Comments at 1-2.

[19] Id. at 2.

not "tolerate the evisceration of a rule by waivers."[20] MCI argues that even if the Commission were to allow exceptions to its rule requiring endogenous treatment of depreciation rate changes, the facts suggest that there is significant reason not to make such an exception in this case.[21]

11. Both MCI and AT&T find Commission precedent against United's claim for waiver. MCI views the costs at issue as ordinary depreciation rate changes and contends that allowing exogenous treatment for any depreciation charges would be inconsistent with the Commission's original decision to treat depreciation endogenously.[22] AT&T asserts that because United's expenses are not beyond its control, the precedent of exogenous treatment previously given to amortizations for reserve imbalances and inside wire investment is inapposite.[23] Rather, according to MCI, the LEC Price Cap Order decision against treating equal access conversion costs exogenously is the relevant precedent.[24] Because United's switch modernization is nearly complete in this study area, MCI maintains, United does not face the financial burdens that other carriers might in complying with the Master Plan.[25]

12. AT&T and MCI both argue that United's claim that the premature retirement of its four switches was beyond its control, which forms the sole basis for its waiver request, is incorrect.[26] AT&T interprets the TPSC's regulations as giving carriers the choice of whether or not to be governed by the TPSC's Master Plan. AT&T asserts that United voluntarily opted to be governed by the Master Plan, and therefore cannot now claim that the resulting increase in its interstate costs was beyond its control.[27]

13. MCI argues that United was so substantially involved in the Master Plan's formation that the resulting costs cannot qualify for exogenous treatment under the price cap rules. MCI maintains that United played a significant role in the development of the alternative regulatory plan that ultimately set the SS7-compatible digital switch deployment schedules. MCI explains that in late 1988, the TPSC established a joint Commission/Industry Steering Committee (Committee) to evaluate the telecommunications regulatory environment in the state of Tennessee, and that United held one of the five industry seats on the Committee. The Committee's recommendations led to the development of both the regulatory reform and

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[20] AT&T Opposition at 1-2 & n.1, citing Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972); MCI Opposition at 2-5.

[21] MCI Opposition at 1-2.

[22] MCI Opposition at 1-3, see also In the Matter of Simplification of the Depreciation Prescription Process, Notice of Proposed Rulemaking, CC Docket No. 92-296, 8 FCC Rcd 146, 150 (paras. 23-24) (1992) (Depreciation NPRM).

[23] AT&T Opposition at 5.

[24] MCI Opposition at 6, citing LEC Price Cap Order, 5 FCC Rcd at 6808 (para. 180).

[25] MCI Opposition at 6-7.

[26] AT&T Opposition at 1; MCI Opposition at 1-2.

[27] AT&T Opposition at 4-5, citing Exhibit A, TPSC Chapter 1220-4-2 (Regulatory Reform), § 1220-4-2.-.55 (1).

technology deployment plans.[28] Further, United was fully aware and participated in the technology implementation schedule envisioned for Tennessee prior to the time that it opted to participate in the interstate price cap plan, and therefore United is not facing the types of increased costs that are extraordinary, thereby deserving exogenous treatment.[29]

14. The alternative regulatory plan that evolved from the Committee's recommendations, argues MCI, appears highly favorable to United. According to MCI, the purportedly "mandated" technology deployment schedule is better characterized as a single component of a calculated and desired compromise to which United was an active party. MCI cautions that approval of United's petition will encourage other LECs to pursue similar actions as they bargain for "economic development plans" that link infrastructure investment with the reduction or elimination of regulation of monopoly services provided by a LEC. MCI concludes that exogenous treatment under such circumstances would open a tremendous loophole to shift network costs to interstate ratepayers. MCI also complains that United has failed to establish that the increased expense would result in "unreasonably high or low rates" absent exogenous treatment.[30]

15. AT&T and MCI also agree that exogenous treatment would be inappropriate in this case in any event because the Tennessee alternative regulatory plan already provides mechanisms for funding network development. AT&T and MCI contend that under the Tennessee alternative regulatory scheme, United is not only able to increase its overall earnings, but is also entitled to fund its state-of-the-art network from "excess" earnings.[31] They argue that just as intrastate ratepayers are protected from increased charges, United's interstate access customers should be protected from increased rates by denying United's request to raise its price cap through the exogenous cost factor.[32]

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[28] MCI Opposition at 3, citing Tennessee Regulatory Reform Plan, p. 2, July 10, 1990.

[29] MCI Opposition at 1-3; ICA claims that United was not only a party to the state proceedings that produced the Master Plan, but that unlike other parties, United did not join in the opposition to the Plan. ICA Opposition at 5-6.

[30] MCI Opposition at 4-5. .

[31] AT&T Opposition at 5; MCI Opposition at 3-4. MCI notes that under the new regulatory scheme, United's earnings have been increased to 10.85 percent, with a 60 basis point range in which it is not required to refund excess earnings. MCI alleges that this, in effect, amounts to an authorized rate of return of 11.45 percent, or nearly an entire percent increase over its authorized earnings level under rate-of-return regulation. MCI asserts that it is from these excess earnings that United may fund its technology deployment schedule or its depreciation expenses. MCI also states that United's Exhibit B illustrates a further safeguard in the Tennessee Plan: to the extent that excess earnings are not available, the TPSC can adjust the network deployment schedule. In fact, Exhibit B shows that the TPSC has already permitted United to defer its switch replacements due to a projected excess earnings shortfall. MCI observes that the Commission's price cap plan offers United a similar safeguard: if United's earnings fall below the lower formula adjustment mark, it is entitled to a prospective adjustment to its cap. Id. at 4 & n. 5, citing LEC Price Cap Order, 5 FCC Rcd at 6788 (para. 10).

[32] AT&T Opposition at 5.

16. ICA argues that United is asking the Commission to allow it to unilaterally identify the amount in addition to that already accounted for network improvement investment in the interstate price cap plan. According to ICA, the price cap allowance was explicitly established in contemplation of very large increases in network development investment. ICA asserts that the percentage point adjustment for the "productivity offset" used in the price caps formula was reduced by nearly one full point by the Commission's decision to utilize a 2.8 percent factor. [33] ICA states that LEC investments of the type at issue here are already contained within the historical trends in investment in the carrier's factors of production and therefore are already captured in the price index. [34]

D. Replies [35]

17. United contends that AT&T is wrong in arguing that United opted to operate under the Master Plan and in so doing has voluntarily incurred the expenses for which it now seeks exogenous treatment. According to United, the plans are separate, and although the Regulatory Reform Plan is elective, the Master Plan is mandatory. [36] The only link between them is that the Regulatory Reform Plan states that "all or part of projected earnings in excess of the carrier's prescribed return may be . . . used to implement the technology [Master Plan] schedule," or for such other purposes as the Commission directs. United explains that by this means, the TPSC has given itself the option of using the Regulatory Reform Plan as a funding mechanism for the Master Plan. In any event, United maintains, it lacked control over the costs in question. [37]

18. The TPSC states that in 1990, it approved both an experimental regulatory reform plan and a ten-year technology master plan and that United participated actively in each proceeding. At the time, according to the TPSC, United publicly stated that, if the TPSC would adopt the proposed regulatory reforms, the carrier would commit to the technology deployment plan. The Master Plan's technology schedule was later adopted as a mandatory requirement as of November, 1992. [38]

19. BellSouth argues that nothing in the Commission's orders or rules conditions exogenous treatment on non-participation or opposition to the agency action that gives rise to exogenous costs. Rather, participation by LECs and AT&T in governmental and

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[33] ICA Opposition at 4, citing LEC Price Cap Order, 5 FCC Rcd at 6798 (paras. 96-99), and Appendices "C" and "D." According to ICA, the lower productivity factor effectively allows the LECs to support at least $1.1 billion in added investment each year.

[34] ICA Opposition at 5-6, citing Further Notice, 3 FCC Rcd at 3389-91 (paras. 346, 349).

[35] United generally denied all of the main claims made in the Oppositions to its waiver request, and various commenters took issue with each others' subsidiary assertions. We address only the more significant issues in this section.

[36] United Reply at 2, citing Exhibit A of the United Waiver Petition, "Ten Year Master Plan for Technology Deployment by Telephone Companies, pp. 2 and 3.

[37] United Reply at 3, quoting Exhibit A to the AT&T Opposition, p. 1.

[38] TPSC Reply at 1-2.

regulatory proceedings which result in exogenous events should be the expected norm, not the exception. [39]

20. United disputes MCI's characterization of the cost changes as general depreciation rate changes because, it argues, the decision to retire the switches was beyond its control. United disagrees that its participation in the Tennessee regulatory process was tantamount to agreeing that the four switches in question should be prematurely replaced. [40] GTE argues that prior Commission decisions cited by MCI on equal access conversion costs and depreciation expense are not a valid precedent for this case. GTE states that here, the TPSC has mandated switch replacements that cannot be justified by increased efficiencies and productivity gains. [41]

21. MCI maintains that whether the costs are characterized as increased depreciation expense or "dying account amortization" is beside the point. The source of the increased expense -- premature retirement of existing plant -- is the same, and endogenous treatment is appropriate for either category of cost. [42] MCI notes that the LECs unsuccessfully argued several times for depreciation expenses to be included in the exogenous cost list in CC Docket No. 87-313, so if the Commission had intended to grant the type of exogenous treatment United now seeks, it had ample opportunity to include depreciation in its definition. [43] Further, MCI observes that in its recent order rejecting exogenous treatment for post-retirement benefits other than pensions, the Commission stated that "not all changes in cost beyond the control of the carrier are likely to result in unreasonably high or low rates, or to otherwise be appropriate for exogenous treatment." [44] MCI reiterates that granting United a waiver to treat exogenously costs incurred as a result of a sought-after intrastate regulatory reform package would set a dangerous precedent. Moreover, MCI states, it would make a mockery of the price cap "incentives" that are designed to motivate LECs to achieve greater efficiencies, technological developments and productivity in the interstate jurisdiction. [45]

22. The TPSC disputes MCI's allegation that United is paying for technology deployment through excess earnings. It states that although the Regulatory Reform Plan does

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[39] BellSouth Reply at 2; accord GTE Reply at 3.

[40] United Reply at 5.

[41] GTE Reply at 4.

[42] MCI Reply at 5 & n. 12. MCI responds to Pacific Bell's claim that achievement of the Commission's policy objectives would be furthered by exogenous treatment for the subject costs by noting that the Commission considered its policy objectives at the time it originally established endogenous treatment for depreciation expenses. Id.

[43] MCI Reply at 6.

[44] MCI Reply at 5, quoting Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Post-retirement Benefits Other than Pensions, Memorandum Opinion and Order, 8 FCC Rcd 1024, (para. 47) (1993) (OPEB Order), pets. for review pending sub nom., Southwestern Bell Telephone Co. v, FCC, No. 93-1168 (D.C. Cir. filed Feb. 2, 1993).

[45] MCI Reply at 4 & n.6.

require United to share a portion of its excess earnings, that is not the source of United's technology funds. [46] United argues that the TPSC's decision to fund the state's Master Plan from excess intrastate earnings is irrelevant to its request to recover the subject costs through the exogenous factor in the federal price cap mechanism. [47] United represents that the $900,994 interstate assignment of the incremental amortization expense equates to a 2 percent temporary increase in total interstate access revenues for United's Tennessee, Virginia and South Carolina study areas. United asserts that this "minimal impact" should satisfy MCI's concerns about the exogenous treatment resulting in unreasonably high rates. [48]

23. NARUC filed reply comments generally supporting cooperative federal - state approaches to policy issues of joint concern. NARUC observes that it has in the past urged that the cost of deploying a nationwide broadband communications network be allocated between the federal and state jurisdictions in an equitable and efficient manner, and that the relief urged by the TPSC in this case seems to have that effect. [49]

III. DISCUSSION

A. Introduction

24. As the Commission recently observed, the price cap plan creates incentives and constraints similar to those in competitive marketplaces, where companies face greater risks, but also can achieve greater profits by operating more efficiently than their rivals. Under price caps, LECs similarly bear the risk of lower profits than under cost-plus rate of return regulation, but are given the incentive of potentially higher earnings for efficiency gains they achieve above the historical norm. They are also constrained, and their consumers protected, by the price ceiling, which helps assure that the profit increase is in fact a result of efficiency gains. In this initial four-year period of operation, the Commission's intent has been to allow the plan to operate in a stable fashion, both to permit efficiencies to be realized and to enable the Commission to draw valid conclusions about LEC performance under the plan over time. This goal is aided by the "backstop" mechanism that provides an additional safeguard against rates that are unreasonably high or low. [50] The LEC price cap plan performance review period is scheduled to begin at the end of the plan's third year of operation, which will be in January, 1994. [51]

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[46] TPSC Reply at 2. The TPSC does not indicate what the source of United's technology funds is to be.

[47] United Reply at 6. United claims that its only recourse for recovering costs beyond its control is exogenous treatment.

[48] United Reply at 7 & n.13. United does not explain why access revenues for Virginia and South Carolina should be affected by the cost changes at issue here.

[49] NARUC Reply at 3-4.

[50] OPEB Order, 8 FCC Rcd at 1031 (para. 42).

[51] LEC Price Cap Order, 5 FCC Rcd at 6834 (para. 385). The performance review will evaluate LEC performance comprehensively, and will include LEC prices, earnings, service quality, and technological progressiveness. The Commission noted that to provide a fair evaluation of the program, it is also important that the initial period before periodic review and

25. In view of the Commission's earlier determinations that general depreciation rate changes be treated endogenously under price caps, United used the correct procedural device by seeking waiver of the Commission's rules. [52] The broad policy issues raised by United's waiver petition are of substantial dimension and complexity. We are cognizant of the importance of the Tennessee Regulatory Reform Plan and Technology Deployment Master Plan to the State of Tennessee. We acknowledge the efforts of the TPSC in attempting to bring the benefits of an advanced telecommunications network to the citizens of the state, and to incorporate these network developments into its regulatory reform plan. Individual state initiatives such as this lie at the heart of our federal system. [53]

26. The Commission is committed to working in a cooperative manner with the states on regulatory reform and network development issues which, as in the instant case, involve issues of joint state and federal concern. Nonetheless, against this commitment we must balance the goals of the price cap program. For the reasons discussed below, we find that United has failed to demonstrate that it is entitled to a waiver.

B. Exogenous Cost Changes Under Price Caps

27. The category of exogenous cost changes was created as an exception to the incentive structure of price caps. [54] This category was originally described as changes in carriers' costs that arise "for reasons wholly beyond their control," as distinguished from ordinary costs that may change with the nature and magnitude of business operations. [55] Examples given were costs due to changes in laws, regulations, or rules, or due to other administrative, legislative, or judicial changes beyond a carrier's control. [56] The Commission found the cap must be adjusted for such costs to assure that the price cap formula does not lead to unreasonably high or unreasonably low rates. [57] Following a case-by-case evaluation of

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the possibility of major adjustments be long enough for incentives to operate. Id.

[52] See LEC Price Cap Order, 5 FCC Rcd at 6808-09 (paras. 182-187); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2671-72 (paras. 73-75); see also Depreciation NPRM, 8 FCC Rcd at 150 (para. 23-24).

[53] As reported in a recent study by the Staff of Telecommunications Reports, at least eighteen states have announced plans to upgrade their state's telecommunications infrastructure. See "Telecom Infrastructure: 1993, Volume One: Government Initiatives to Spur Network Modernization," 1993 Report Series No. 5, Section III, State Regulatory and Legislative Initiatives, pp. 45-87.

[54] OPEB Order, 8 FCC Rcd at 1031-1033 (paras. 45-52).

[55] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3413 (para. 397) (1988) (Further Notice);

[56] Id. at 3383 n.738.

[57] See OPEB Order, 8 FCC Rcd at 1031; LEC Price Cap Order, 5 FCC Rcd at 6807; Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3002 (1989)

specific cost changes proposed by the Commission and commenting parties, a list of these exceptional, exogenous cost changes which should result in categorical adjustment to the PCI was adopted in Section 61.45(d) of the Rules. [58] Upon substantial development in the record, general depreciation rate changes were denied exogenous treatment. [59]

28. Consistent with the limited nature of the exogenous cost category, the Commission has also rejected suggestions that all cost changes required by this Commission receive exogenous treatment, and has rejected the proposal that all uncontrollable "extraordinary costs," such as the costs resulting from a natural disaster, should be treated exogenously. [60] In both the AT&T Price Cap Order and the LEC Price Cap Order, the Commission has stated that a carrier's ability to cope with unforeseen events, yet remain competitive, is in part a function of its engineering, investment, and operational decisions. Further, it would create the wrong incentives if the Commission were to promise automatic flow-through of all extraordinary costs. [61] In the case of LEC price caps, the Commission stated in the Second Further Notice that there may be some regulatory decisions the consequences of which would warrant an adjustment to the LEC price cap formula, but that this determination should be made on a case-by-case basis. [62]

29. Because the designation of any cost change as exogenous removes the incentive for efficiency that is a principal goal of price caps, a major consideration in evaluating whether a particular cost change should be accorded exogenous treatment has been the extent to which exogenous treatment may affect the carriers' incentives. This Commission has noted that an efficiency incentive is effective only for costs which the carrier has some ability to control. Accordingly, some changes in costs triggered by regulatory action beyond the control of the carriers have been given exogenous treatment. At the same time, we have stressed that "not all changes in costs beyond the control of the carrier are likely to result in unreasonably high or low rates, or to otherwise be appropriate for exogenous treatment." [63]

(AT&T Price Cap Order);

[58] See 47 C.F.R. § 61.45(d).

[59] See LEC Price Cap Order, 5 FCC Rcd at 6808-09 (paras. 182-187); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2671-72 (paras. 73-75); see also Depreciation NPRM, 8 FCC Rcd at 150 (para. 23-24).

[60] AT&T Price Cap Order, 4 FCC Rcd at 3019, 3020 (paras. 298-299, 303).

[61] AT&T Price Cap Order, 4 FCC Rcd at 3020 (para. 303); LEC Price Cap Order, 5 FCC Rcd at 6809-10 (para. 189).

[62] Second Further Notice, 4 FCC Rcd at 3192 (para. 661). The Commission recently determined that a limited portion of the LECs' costs in providing their basic 800 database access service should be accorded exogenous treatment due to the unique circumstances presented in that case. See Provision of Access for 800 Service, Second Report and Order, CC Docket No. 86-10, 8 FCC Rcd 907, 911 (para. 27 & n.51)(1993)(800 Database Order), petitions for reconsideration pending.

[63] OPEB Order, 8 FCC Rcd at 1031-32 (para. 47).

30. A petition for waiver of the Commission's rules may be granted for good cause shown. [64] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. [65] The Court of Appeals has stated that waivers permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that, "[a]n applicant for waiver faces a high hurdle even at the starting gate." [66] In WAIT Radio, the court explained that "[t]he very essence of a waiver is the assumed validity of the general rule . . . ." [67] Given the validity of the rule, the test identified in WAIT Radio is for the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation. [68] Waiver is thus appropriate only if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than adherence to the general rule. [69] Therefore, the general test for whether United may be granted a waiver is whether United has shown such special circumstances as individualized hardship or inequity that warrant deviation from the Commission's rules and whether such deviation better serves the public interest.

31. Adjustments to the price cap index for exogenous costs are governed by Section 61.45 (d) of the Commission's Rules, 47 C.F.R. Sec. 61.45 (d), which states that exogenous cost changes in the price cap formula shall be "limited to those cost changes that the Commission shall permit or require." Subsection (1) specifies that these shall include cost changes resulting from eight types of events. This is the first time that we have considered a request for waiver, as opposed to a rule change, by a LEC seeking exogenous treatment for a cost change not specifically included in Section 61.45 (d) (1). The test we have previously articulated in the rulemaking context for exogenous treatment is whether the cost change is (a) the result of regulatory action beyond the control of the carrier, and (b) not already reflected in the price cap formula. Furthermore, in evaluating claims for exogenous treatment, we must also keep in mind that the purpose behind granting exogenous treatment is to ensure that the incentive structure of the price cap formula does not produce unreasonably high or low rates. In the waiver context, we conclude that in addition to meeting the foregoing criteria for

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[64] See Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[65] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)

[66] WAIT Radio v. FCC, 418 F.2d 1153, 1157, 1159 (D.C.Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (an agency's obligation to give meaningful consideration to waiver applications does not contemplate that agency must or should tolerate evisceration of a rule by waivers).

[67] WAIT Radio, 418 F.2d at 1158.

[68] See Northeast Cellular, 897 F.2d at 1166, citing WAIT Radio v. FCC, 418 F.2d 1153, and Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970). See e.g., In the Matter of Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 8 FCC Rcd 7006, 7069-70 (paras. 150-151) (1992).

[69] Northeast Cellular Tel. Co. v. FCC, 897 F.2d at 1166 (grant of waiver vacated and remanded for failure of FCC to articulate any standard by which underlying policy could be determined; record revealed nothing unique about applicant's situation).

extending exogenous treatment to a particular category of costs, a petitioner for waiver must also make a showing of some other unique circumstances, such as hardship or inequity, to justify deviation from the rules for that particular case, and must further demonstrate that such deviation better serves the public interest. For the reasons stated below, we find that United has failed to justify the relief it seeks.

C. United's Showing: Waiver of Section 61.45(d)

1. United's Circumstances Are Not Unique

32. The costs are ordinary depreciation. Although United refers to the costs as "amortization costs," we find that they are in fact depreciation rate changes. [70] While the Commission, at United's last depreciation re-prescription, required the net service value for the accounts at issue to be amortized, from an accounting perspective, this particular amortization is nonetheless in the nature of a depreciation rate change because it was derived on the basis of the remaining life formula the Commission employs in prescribing new depreciation rates. [71] We note that use of the remaining life of the plant in this case also differentiates United's situation from the amortization of reserve deficiencies and inside wiring cited by United. [72] In those cases, the amortization periods were not estimated to be the remaining life of the plant. Moreover, amortizations of this nature, so-called "dying account" amortizations, are employed by the Commission to resolve practical problems that the depreciation rate formula produces when accounts are rapidly phased-out. [73] The Commission did not amortize reserve deficiencies to resolve rate fluctuation problems. Thus, the issue presented by United's petition is whether

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[70] An amortization amount is a specific amount to be charged to depreciation expense each year. See, e.g., Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, 3 FCC Rcd 984 (1988).

[71] See The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: The Bell Telephone Company of Pennsylvania, et al., 8 FCC Rcd 816 (1993) (Revised Depreciation Order). In the Revised Depreciation Order, the Commission authorized United to amortize the "net service value" for the Digital Electronic 1210 Switching Account over a twenty-four month period ending December 31, 1993. The net service value is equal to the plant balance less the accumulated reserve balance and future net salvage estimate. The net service value is then divided by the amortization period, which, in this case, was the remaining life of the plant. The depreciation rate formula the Commission employs is equal to book value less any accumulated depreciation minus future net salvage/average remaining life. We note that in this same order requiring United to amortize the expense resulting from retirement of the four Digital 1210 switches at issue here, the Commission also required other carriers to amortize expense resulting from amortization of their dying accounts. None of those carriers has sought exogenous treatment of the expense associated with these accounts.

[72] Additional reasons why the analogies drawn by United are inapposite are discussed infra.

[73] For example, if the final date of retirement for plant in a dying account is mis-forecast by as little as a few months, wide fluctuations in the rates can result. The most practical approach to avoid such problems has been to adjust the depreciation expense each month to reflect the current plant and reserve balances. This allows carriers to reduce the net plant to zero without wide fluctuations in the rates. Dying account amortizations are generally used by the Commission to more accurately target depreciation expense recovery.

waiver of the rule requiring depreciation rate changes to be treated endogenously is appropriate.

33. The TPSC's technology deployment schedule directing United to prematurely retire four switches is not fundamentally different from the sort of typical decisions state regulators make which direct changes in a carrier's plans for network upgrades and development. The TPSC has characterized its own treatment of the cost change as an increase in United's depreciation rates. [74] State mandated increases in a carrier's depreciation rates are not unusual, and the TPSC correctly recognized that this Commission may well hesitate in giving approval to raise price caps simply because a state regulatory agency grants increased depreciation rates, even in the name of advancing technology. [75]

34. The costs are not the result of regulatory action beyond United's control. The cost change at issue ultimately resulted from the requirements of the TPSC's Master Plan. Whether, and to what degree, United influenced or controlled the creation and adoption of these regulatory requirements has been the focus of extensive debate in the comments. Because our rules on exogenous costs should not affect the level of carrier participation in regulatory or governmental proceedings, we must be very careful in evaluating claims for exogenous treatment on the basis of administrative action alleged to be beyond the control of the carrier. BellSouth correctly observes that nothing in the Commission's orders or rules conditions exogenous treatment on non-participation or opposition to the agency actions that gave rise to exogenous costs. [76] We wholly agree that carrier participation in governmental and regulatory proceedings that result in exogenous events should be the expected norm, and that participation in the process of agency consideration does not mean control of the process; a decision of a governmental agency remains a governmental decision. Nonetheless, our exogenous cost test recognizes that in some situations, a carrier's participation may reach a point where it can no longer be said that the outcome is "beyond its control."

35. AT&T's position that the expenses are ineligible for exogenous treatment because they were voluntarily incurred by United is contradicted by both the TPSC in its comments and by the text of the TPSC regulations incorporating the Master Plan, which states that it applies to all telecommunications carriers. [77] MCI, on the other hand, has vigorously argued that United was so substantially involved in the negotiations that led to the adoption of the regulatory reform and technology deployment plans that the results cannot be said to be beyond United's control. [78] The TPSC acknowledges United's substantial participation in the development of the regulatory reform and technology deployment plans, although it also states that the Master Plan was not a company-initiated project, but rather was developed by an

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[74] See TPSC Comments at 2.

[75] Id.

[76] See BellSouth Reply at 2; GTE Reply at 3.

[77] See Exhibit A to United Petition, "Ten Year Master Plan for Technology Deployment by Telephone Companies," Chapter 1220-4-6-.02(5), p.2.; TPSC Reply Comments at 1-2.

[78] See MCI Opposition at 3, citing Tennessee Regulatory Reform Plan. See also Ex Parte Letter from Elizabeth Dickerson, MCI to Barbara Esbin, Tariff Division, Common Carrier Bureau, FCC (July 29, 1993), attaching Tennessee Regulatory Reform Plan. United was a named participant in the TPSC/Industry Committee whose recommendations later led to the Master Plan's SS7-compatible switch deployment schedule.

independent consultant whose recommendations suggested improvements United's own engineers said were not needed. [79] Based upon the record as a whole, for the reasons explained below, we conclude that United has failed to carry its burden of demonstrating that the costs at issue were the result of regulatory action beyond its control.

36. This Commission has been repeatedly asked to extend exogenous treatment to changes in depreciation rates, and has repeatedly declined to so do. [80] The principal reason has been that although the Commission establishes depreciation rates by determining the projected service lives of various types of plant, depreciation is not an exogenous cost that is beyond the carrier's control. [81] The Commission has noted that the amount of depreciation expense on a carrier's books, and fluctuations in that amount, are the result of some of the most important and thoroughly considered management decisions that a carrier makes -- i.e., its capital investment decisions. [82] Thus, although the Commission's prescription of depreciation rates may influence the overall amount of depreciation expense, the depreciation expense level is more a reflection of literally thousands of decisions a carrier makes about how to produce services and goods. In the LEC Price Cap Order the Commission adopted this conclusion and reiterated that it is consistent with the concept of incentive regulation. If the Commission were to guarantee recovery of depreciation expense for carriers, it would risk destroying the very incentives that the price cap program was designed to create. [83] Accordingly, the carrier has failed to show that the regulatory action taken is this instance so differs from regulatory action taken in other depreciation rate change contexts that we would reconsider our general rule on depreciation rate changes.

37. Moreover, United's argument that regulatory action caused it to incur a higher level of depreciation cost than it anticipated is not dissimilar to arguments which were previously rejected by the Commission. [84] United controlled the capital investment decisions

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[79] See TPSC Comments at 1-2.

[80] See e.g., Further Notice, 3 FCC Rcd at 3419-20 (para. 413); Second Further Notice, 4 FCC Rcd at 3189 (para. 652); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2671 (para. 2671);and see LEC Price Cap Order, 5 FCC Rcd at 6809 (paras. 182-187); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2672 (paras. 74-75).

[81] See Further Notice, 3 FCC Rcd at 3421 (para. 416).

[82] See Further Notice, 3 FCC Rcd at 3420 (para. 415).

[83] LEC Price Cap Order, 5 FCC Rcd at 6809 (para. 182-83). In the LEC Price Cap Reconsideration Order, the Commission again rejected carriers' attempts to secure exogenous treatment for depreciation rate changes. Among the arguments rejected was the claim that exogenous treatment is appropriate because "depreciation costs are driven by forces outside the LECs' control, such as customer needs, competition, regulatory change, and new operation efficiencies." The Commission found that reconsideration on these grounds was not warranted. LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2671-72 (paras. 73-74) (emphasis added).

[84] In addition, the Commission has rejected arguments that endogenous treatment of depreciation rate changes would discourage the introduction of new services on the ground that price cap regulation provides strong incentives to introduce new services. For example, not only are new services held outside the price cap index for up to a year, but cost savings resulting from deployment of modernized facilities may yield earnings above the levels

that determined the state of its network prior to the TPSC's decision to examine the technological capabilities of the carriers in Tennessee and to order network upgrades and replacements necessary for the provision of specified service capabilities and technologies in various parts of the state. United had a substantial level of participation in the TPSC's regulatory reform and technology deployment program. That the requirements were later made mandatory does not alter this fact. The events leading to the switch retirements were not so beyond United's control as to warrant an exception to the Commission's rule against treating depreciation rate changes as exogenous costs.

38. United's attempts to liken the costs at issue to the specific amortization costs the Commission has previously recognized as exogenous are also unavailing. As we demonstrated supra, from an accounting standpoint, United's amortization costs differ from those amortizations previously accorded exogenous treatment. We further find that they differ from a substantive price caps perspective as well. In the case of amortization costs associated with eliminating the LECs' depreciation reserve imbalances, exogenous treatment was deemed appropriate because the costs were not related to productivity, but to changes in Commission methods of calculating depreciation expense. The expiration of amortizations associated with inside wiring costs were granted exogenous treatment on the basis of the Commission's historical regulatory treatment of inside wire. [85] We determined that it would be unfair to ratepayers who had borne the costs of such amortization programs not to benefit by the corresponding rate reductions at the time they expired. [86] Accordingly, we find that United has failed to show that the costs at issue were beyond its control and we therefore conclude that United has failed to demonstrate unique circumstances which justify a departure from our existing rule requiring endogenous treatment of ordinary depreciation costs.

39. Endogenous treatment would not result in hardship or inequity. United has also failed to show that it is uniquely situated on the grounds that it would suffer some hardship or inequity under our general rule treating depreciation rate changes endogenously. That is, United has failed to demonstrate that exogenous treatment is needed to avoid the hardship of unreasonably high or, as in this case, low rates.

40. Exogeneous cost treatment is granted when a change in cost triggered by administrative action beyond the control of the carrier would result in unreasonably high or low rates under the price cap formula absent exogenous treatment. [87] In response to MCI's argument that United had failed to show that the impact of the depreciation change would result in unreasonably high or low rates unless exogenous treatment was granted, [88] United maintained

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permitted under rate of return, which the carrier may retain subject to sharing requirements. LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2672 (para. 75).

[85] See Further Notice, 3 FCC Rcd at 3421-22 (para. 418-420); Second Further Notice, 4 FCC Rcd at 3016 (para. 292); LEC Price Cap Order, 5 FCC Rcd at 6809 (para. 185); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2673-74 (para. 78-79).

[86] See Second Further Notice, 4 FCC Rcd at 3016-17 (para. 292); LEC Price Cap Order, 5 FCC Rcd at 6808 (para. 173).

[87] See OPEB Order, 8 FCC Rcd at 1031; LEC Price Cap Order, 5 FCC Rcd at 6807; AT&T Price Cap Order, 4 FCC Rcd at 3002.

[88] See MCI Opposition at 5.

that the $900,974 impact would equate to a 2 percent temporary increase in total interstate access revenues for United's Tennessee, Virginia and South Carolina study areas. United stated further that this "minimal impact surely satisfies MCI's concerns about the exogenous treatment resulting in unreasonably high rates." [89]

41. United's response indicating that the rate increase sought would be of "minimal impact" appears to also indicate that in the absence of exogenous treatment its rates would not be unreasonably low. The additional safeguard under price caps, if United's earnings were to fall below the lower formula adjustment mark, is that United would be entitled to a prospective adjustment to its cap. [90] However, it is impossible to tell on this record if such an adjustment will be required.

42. The costs are already reflected in price cap formula. United and Pacific Bell have also asserted that the increased costs due to the switch retirements will not be reflected in the GNP-PI or the productivity offset. [91] ICA generally contests these claims by arguing that the price cap allowance was explicitly established in contemplation of very large increases in network investment. In addition, according to ICA, the price cap index selected for LECs already accounts for new LEC investments of the type at issue here because they are contained in the historical trends in investment reflected in the carrier's factors of production. [92]

43. United did not respond to ICA's argument regarding the GNP-PI or the productivity offset, [93] and has otherwise failed to provide any support for its claims that the increased costs will not be reflected in the GNP-PI or the productivity offset factor. We therefore find that United has not carried its burden on this issue.

44. Moreover, network development has been identified as a goal of price cap regulation since the outset. In the LEC Price Cap Order, the Commission identified price caps as a primary tool in its efforts to "encourage the development of a competitive, innovative, and excellent American communications system." Price caps, it was hoped, would encourage the LECs in network modernization, advanced applications, and new services, through appropriate investment incentives. The Commission stressed that "under price caps the LECs will have increased incentive and opportunity to develop and introduce new services; to invest in new technology, like ISDN and SS7, that will promote cost savings and efficiencies; to innovate; and to upgrade their networks." Further, the Commission intended that LECs under price caps should have sufficient incentives to expand network investment in advance of demand, even if that meant immediate and heavy investment in many activities that do not have immediate market potential. [94] Thus, the answer to United's claim that exogenous treatment is the only way it can recover these costs is that the Commission has already allowed for recovery of network development costs through the price cap program itself.

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[89] See United Reply at 7 n.13.

[90] See LEC Price Cap Order, 5 FCC Rcd at 6788 (para. 10).

[91] See United Petition at 9; Pacific Bell Comments at 2.

[92] See ICA Opposition at 5.

[93] See United's Reply at 7.

[94] LEC Price Cap Order, 5 FCC Rcd at 6827, 6830 (paras. 333-335, 354).

2. Waiver Not Consistent With the Public Interest

45. Price cap incentives would be undermined. In addition to the foregoing, we also decline to waive our price cap rules and grant United exogenous treatment because in this instance, exogenous treatment would undermine the incentives underlying price caps to increase its revenues by increasing the efficiency of its operations, rather than its rates. To the extent that these particular cost changes can be considered out of the ordinary, they are nonetheless the type of cost change that United should be able to respond to within the structure of the price cap plan. This is consistent with the Commission's reasoning in the Further Notice rejecting exogenous treatment for equal access implementation costs. There, [95] the Commission explained:

> In proposing a mechanism that permits price caps to change according to changes in exogenous costs, we are not simply interested in identifying costs that a carrier cannot control. The exogenous factors we seek are those that are unrelated to the fundamental decisions a carrier makes that affect its productivity. Decisions concerning equal access implementation are intricately related to the future structure of the network, and hence, its productivity. Moreover, because equal access has been mandated by the courts and this Commission, we see no need to provide "incentives" for its implementation.

The switch retirements at issue are directly related to the future structure of United's network, and therefore, its productivity.

46. More importantly, these particular switch retirements are being made in order that United's network perform more efficiently and be capable of offering a wide variety of new services to Tennessee consumers. Improvement in network operations for LECs, which will result in greater cost savings and operating efficiencies in the future, is specifically identified as a benefit of accelerating the deployment of SS7 throughout the State of Tennessee. Indeed, the promise of increased operating efficiencies is the core of the Master Plan. [96] The

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[95] Further Notice, 3 FCC Rcd at 3423 (para. 422).

[96] For example, Section 1220-4-6-.02(1) states that the added costs are "within reason and should be capable of funding from increased operating efficiencies fostered by regulatory reform and from new service revenues; with little, if any, observable effect on the ratepayers in Tennessee." Subsection (2) indicates that the Plan takes into account the existing network and current plans, the forecast of new technology for future enrichment, and the prospect that new applications will quickly evolve once the capabilities are ubiquitously in place. Section 1220-4-6-.03(1)(a) identifies the full deployment of intelligent network capability (SS7) as the source for network operations improvements which will "result in greater cost savings and operating efficiencies in the future." See Exhibit A to United's Petition, Sections 1220-4-6-.02 and .03, at p. 2-3.

cost changes at issue are directly related to carrier productivity and efficiency. [97] Rather than necessitating an adjustment to United's price cap index, these cost changes should be treated no differently than ordinary depreciation expenses. We also note that half of the Digital 1210 switches are being retired two years in advance, and the other half six years in advance, of United's own replacement schedule. [98] These time periods are sufficiently short that ordinary depreciation expense treatment is warranted. Like equal access conversion costs, although mandated by regulatory action, they do not warrant exogenous treatment.

47. Depreciation rate changes are treated endogenously under price caps because equipment deployment and network development decisions are among the most important management decisions a carrier makes about how to provide service, and are fundamentally tied to how productive and efficient its operation will be. [99] A carrier's ability to cope with unforeseen events, including regulatory change, yet remain competitive, is in part a function of its key managerial decisions. Under price caps, United is granted higher earnings potential, but not necessarily higher rates, to compensate for the effects of cost changes. This provides incentives to the carrier to operate more efficiently. The effect of granting United's petition in this case would be to remove its incentive to operate more efficiently, a result wholly inconsistent with the incentive structure of price cap regulation.

48. Although there is some dispute in the comments as to the source of funding for United's switch replacements, Exhibit B to United's Petition indicates that at least a portion of the technology deployment and related depreciation expense on "stranded investment" be funded from United's projected excess earnings. [100] Thus it appears that the TPSC has, as MCI and AT&T argued, protected Tennessee ratepayers by seeking sources other than rate increases to fund the network upgrades embodied in its Master Plan. The goals of the Tennessee regulatory reform and technology deployment plans are not dissimilar from what this Commission seeks through its price cap incentive regulation: allowing higher earnings potential through efficiency incentives, not higher rates. Consistency with the Tennessee plans, therefore, would appear to require endogenous treatment for United's depreciation rate changes, so that the efficiency incentives behind both the state and federal versions of regulatory reform may operate as intended. We conclude that United has also failed to show that exogenous treatment is otherwise appropriate in this case. Thus, United has presented no persuasive reason why the costs it incurs to achieve the Master Plan's ends should be allowed to increase its rates to interstate ratepayers through an exogenous cost adjustment.

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[97] Thus, GTE's argument that United will incur costs due to its retirement of four non-SS7-capable digital switches that cannot be offset by either related decreased operating costs or productivity gains, is flatly contradicted by the TPSC's Master Plan. See GTE Reply at 4.

[98] See Ex Parte Letter from Richard D. Lawson, Director-Federal Regulatory Relations, United Telephone Companies, to Ms. Barbara Esbin, Federal Communications Commission August 22, 1993, attaching United Telephone - Southeast Replacement Schedule, ITT 1210 Switches - Tennessee.

[99] See Further Notice, 3 FCC Rcd at 3420 (para. 415).

[100] Compare MCI Opposition at 3-4 with TPSC Reply at 2. See Exhibit B "Earnings Investigation of United Inter-Mountain Telephone Company," Tennessee Public Service Commission, Docket No. 90-07832, Order, at pp. 1-2 & n.1.

IV. CONCLUSION AND ORDERING CLAUSES

49. For the foregoing reasons, we find that United has failed to meet its burden of demonstrating that the premature switch retirement costs described in its petition qualify for exogenous treatment by waiver of Section 61.45 (d) of the Commission's price cap plan. United has failed to show that costs of this nature are unique, or that it will suffer hardship unless it receives exogenous cost treatment. After weighing all the factors and considerations, we find that the record demonstrates that United's so-called "amortization" is actually depreciation, and that the Commission's original decision according depreciation rate changes endogenous treatment would be seriously undermined by granting United a waiver in this case. United has failed to demonstrate that the cost change at issue was beyond its control, or that it in any way qualifies for exogenous treatment in the sense originally intended by the Commission when it established the exogenous cost factor in its price cap plans. United has further failed to demonstrate that the cost change is not already reflected in the price cap formula, or that it would produce unreasonably low rates if treated endogenously. Finally, United has not established that the exogenous treatment it seeks is either consistent with the incentive structure of price caps or is otherwise appropriate for exogenous treatment.

50. Accordingly, IT IS ORDERED that, pursuant to Sections 1.3 and 61.45(d) of the Commission's Rules, 47 C.F.R. § § 1.3 and 61.45(d), the petition for waiver of United Telephone - Southeast is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs

I support this decision rejecting the petition of United Telephone - Southeast (United) for a waiver of the Commission's rules which limit exogenous cost changes under price caps to eight specific items. Those rules do not permit exogenous treatment of depreciation rate changes, and United has not demonstrated that a waiver is warranted.

At issue in this item is the proper treatment of the interstate portion of costs resulting from the early retirement of four central office switches in Tennessee. That early retirement is part of a local exchange telecommunications infrastructure modernization initiative entered into between the Tennessee Public Service Commission and carriers in that state. I agree with the determinations in the Order that these costs are in fact depreciation rate changes, and that United's waiver request seeks, in effect, waiver of the price cap rules requiring endogenous cost treatment of such changes. I am also in agreement with the standard for grant of such a waiver articulated in this item, and the determination that United's request does not meet the criteria that comprise that standard.

Endogenous treatment of depreciation rate changes is necessary to maintain the desired incentive structure of price caps, and is important in providing price cap carriers with incentives for efficiency and productivity. The Commission has aptly recognized that, "Some of the most basic decisions a carrier must make in its quest for improved productivity have to do with the deployment of plant", and that exogenous cost treatment of changes in depreciation expense would distort proper decision making and the desired incentives.[1]

I write separately to point out that consistency and equity

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[1] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Notice of Proposed Rulemaking, 4 FCC Rcd. 2873 (para. 291) (1989).

dictate that endogenous treatment of depreciation rate changes be accompanied by the grant to carriers -- in particular local exchange carriers (LECs) regulated under price caps -- of as much control over depreciation rates and expense as is feasible, consistent with prevailing competitive and regulatory circumstances. In my view, this item highlights the need for the Commission to be aggressive in pursuing reform of its depreciation practices and to ensure that those practices not lag significant market and technological developments.

The Commission prescribes depreciation rates, based primarily upon the pattern of a carrier's deployment and retirement of assets. Thus, while the service lives of plant and equipment are major determinants of depreciation rates (and those lives are the result of LEC decisions), the Commission and carriers actually play a shared role in determining depreciation rates. Those rates have been -- at least in the past -- in part a product of the Commission's regulatory objectives. Moreover, the Commission has acknowledged that its past depreciation practices and rates may not have adequately kept pace with developments in telecommunications markets.[2]

Steps have been taken to correct past problems in the Commission's depreciation practices, including the adoption of the remaining life formula and equal life group methodology. Moreover, in September, 1993 we adopted a plan to simplify the depreciation prescription process.[3] The basic factor range approach adopted for price cap LECs will provide these carriers some flexibility in setting depreciation rates, in addition to streamlining and simplifying the depreciation prescription process. However, this flexibility pertains only within specified limits. The Commission was unwilling to grant price cap LECs more autonomy in determining depreciation rates, as it did with AT&T, primarily due to the earnings sharing provisions of the LEC price cap plans and its judgement that the current state of competition for LEC access services did not warrant granting greater autonomy.

In the Depreciation Simplification Report and Order, the Commission determined to revisit the issue of depreciation reform for price cap LECs if and when: the rate-of-return based earnings sharing "backstop" is eliminated; it is determined that depreciation rates could not be used to manipulate that backstop to ratepayers detriment; and/or competition in LEC markets is determined to be sufficiently vigorous. These are among the issues that should be addressed in the LEC price cap plan performance

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[2] Simplification of the Depreciation Prescription Process, Report and Order, 8 FCC Rcd. at 8052 (para. 51) (1993).

[3] Id.

review, the period for which commences in January, 1994.[4] I will examine these issues in the proceeding closely. I also will continue to urge the Commission to institute a proceeding to investigate avenues to ensure the Commission's depreciation practices and policies respond speedily to changes in LEC patterns of plant investment and retirement.

In sum, the Commission must not allow its depreciation policies and processes to lag behind technological and market developments, as has happened in the past. I will continue my efforts to ensure this does not occur.

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[4] LEC Price Cap Order, 5 FCC Rcd. at 6834 (para. 385).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DA 93-1579
	)	
	)	
Local Exchange Carrier Switched	)	
Local Transport Restructure Tariffs	)	

ORDER

Adopted: December 29, 1993; Released December 29, 1993

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 1, 1993, 53 local exchange carriers (LECs) [1] filed their initial interim switched access local transport restructure tariffs with the Commission as required by the Transport Orders. [2] Subsequently, on November 15, 1993, twelve LECs filed revised tariffs. The tariffs are currently scheduled to become effective December 30, 1993. Fourteen petitions were filed against the LECs' initial tariffs; two petitions were filed against the revised tariffs filed by several LECs on November 15, 1993. [3] The petitioners' requests for Commission action on the LECs' transport restructure tariffs extend from outright rejection of

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[1] These LECs are listed in Appendix A, together with the Transmittal and F.C.C. tariff numbers of their September 1, 1993 transport tariff filings. The abbreviations for the LECs as indicated in the Appendix are used throughout this Order. GTOC and GSTC are also referred to collectively as GTE. Concurrent with the filing of their tariffs, twenty-one LECs filed petitions for waiver of various aspects of the transport filing requirements and rules. These waiver petitions have been addressed in a separate Order. Petitions for Waiver of Transport Rate Structure and Pricing Requirements, DA 93-1524 (Com.Car.Bur. Dec. 17, 1993).

[2] Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (Transport Order); First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 (1993) (First Reconsideration Order); Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 6233 (1993) (Second Reconsideration Order). These decisions are collectively referred to as the Transport Orders.

[3] Appendix B contains a list of the parties filing petitions in this proceeding. The abbreviations for the parties as indicated in the Appendix are used throughout this Order. Petitions or comments filed in response to the LECs' November 15th transport tariff revisions are referred to herein as "11/30 Petitions or Comments."

some of the tariffs, [4] to suspension for 5 months or longer, [5] to suspension until a plan can be implemented to phase-in the rates over a two-year period, [6] to suspension for one day. [7] All of the tariffs were petitioned against by one or more parties. [8] Twenty-seven LECs filed replies to the initial set of petitions; two LECs filed replies to the subsequent petitions. [9] For the reasons discussed below, we deny the petitions and permit the tariffs to take effect as scheduled.

II. BACKGROUND

2. In its Transport Orders, the Commission established rules to govern the rate structure and pricing of the transport component of interstate switched access provided by local exchange carriers (LECs) to enable interexchange carriers (IXCs) to originate and terminate interstate traffic. LECs currently assess a uniform charge per minute-of-use (MOU), a requirement imposed by the Modification of Final Judgement (MFJ) which was to remain in place until 1991. In the Transport Order, the Commission found that this "equal charge" rate structure no longer served the public interest. The Commission determined that the interim local transport rate restructure and pricing plan it adopted would better achieve the three goals of: (1) encouraging efficient use of transport facilities by allowing pricing that reflects the way costs are incurred; (2) facilitating full and fair interexchange competition; and (3) avoiding interference with the development of interstate access competition. [10]

3. The interim local transport restructure plan thus developed in the Transport Orders has these major features:

> * The interim rate structure consists of entrance facilities, direct-trunked transport, tandem-switched transport and the interconnection charge. Flat charges apply to entrance facilities and direct trunked transport, while usage-sensitive charges apply to tandem switched transport. The interconnection charge is usage sensitive and is to be paid by all interstate access customers that interconnect with the LEC switched access network.

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[4] Allnet Petition at 1.

[5] CGI Petition at 10-15.

[6] Goodyear Petition at 12.

[7] MCI Petition at 1, 14 (1 day suspension of tariffs of Tier 1 LECs and NECA); AT&T Petition at 14, 39.

[8] See AT&T Petition at Appendix A (listing every LEC filing restructured switched access transport tariff).

[9] Appendix C contains a list of those LECs responding to petitions and comments against their tariffs. Replies filed in response to 11/30 Petitions or Comments are referred to herein as "12/8 Replies."

[10] See Transport Order, 7 FCC Rcd at 7009-12, ¶¶ 5-14. Prior to the effective date of the interim rate structure, the LECs are required to retain the existing equal charge per unit of traffic rate structure. 47 C.F.R. § 69.127.

* Initial entrance facilities and direct trunked transport rates will be presumed reasonable if based on the non-discounted rates for equivalent special access offerings as of September 1, 1992, on a component-by-component basis, provided that such rates satisfy a benchmark DS3-to-DS1 ratio of 9.6-to-1.

* Initial tandem switched transport rates will be presumed reasonable if the rates for tandem switched transport components (other than the tandem charge) are set on the basis of rates for corresponding direct trunked transport service components. These direct trunked transport rates are to be converted to a voice-grade equivalent basis, assuming 9000 MOU per circuit, and weighted according to the LEC's relative proportion of fiber and copper facilities as reported in ARMIS.

* The tandem switched transport element will include a per-minute tandem sub-element charge that reflects the costs of tandem use. The tandem switching charge will be presumed reasonable if set to recover 20 percent of the current Part 69 interstate transport revenue requirement for tandem switches, which embodies fully distributed costs. This sub-element is to be calculated based on historical demand. The tandem revenue requirement can be computed by adding the same proportion of overhead-to-tandem investment and associated expenses as the amount of overhead loaded on the transport category as a whole.

* The interconnection charge will initially be priced on a residual basis. The transport rate restructure was intended to be revenue neutral for the LECs. Therefore, the level of the interconnection charge will be determined by the decisions made concerning the rate levels for the facilities-based rate elements: entrance facilities, direct trunked transport and tandem switched transport.

* The interconnection charge is to be computed by first determining the revenue LECs would receive from facilities-based transport charges by taking the total historical amount of usage of facility-based transport elements and multiplying the amounts by the rates for those elements under the restructure. To obtain the interconnection charge revenue requirement, LECs must subtract this amount from (in the case of price cap LECs) their total revenue from transport under pre-existing rate and demand levels, or (in the case of rate-of-return LECs) their total transport revenue requirement under Part 69. Finally, the interconnection charge revenue requirement is divided by local switching minutes-of-use to derive a per-minute interconnection charge. [11]

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[11] See Transport Order, ¶¶ 8, 42, 44, 50-61; First Reconsideration Order, ¶¶ 26-28, 38, 45, 51-53; Second Reconsideration Order, ¶¶ 3-6; see also Commission Requirements for Cost Support Material To Be Filed With Local Transport Tariffs, Order, 8 FCC Rcd 6418 (Com.Car.Bur. 1993) (TRP Order) at Appendix B and C, Section 69.124 Interconnection Charge.

4. The Commission concluded that the foregoing approach to local transport was an improvement over the equal charge rate structure because the former promotes more efficient use of LEC networks, and paves the way for the implementation of expanded interconnection for switched transport through an unbundled rate structure. [12] After reiterating that its decision to adopt a new structure and pricing approach for transport was based on the policy considerations discussed throughout the Transport Order, the Commission discussed estimates of the anticipated impacts of the transport restructure on large, medium and small IXCs contained in data provided by the LECs. The data filed by the LECs indicated that, on average, the large IXCs would face total switched access rate decreases of about 0.6%, medium IXCs would face rate increases of 0.9%, and small IXCs would face relatively modest rate increases of 1.8%. Although small IXCs would face rate increases slightly larger than the medium IXCs, the Commission concluded that these would not appear to unreasonably increase their access costs during the interim period. [13]

5. In the First Reconsideration Order, the Commission imposed two additional requirements on the LECs. First, the Commission required the seven regional Bell Operating Companies (BOCs) and GTE to submit revised estimates of the impact of their rate changes on large, medium and small IXCs. Revised impact estimates were to enable the Commission to assess whether significant unexpected changes were likely to result, in light of (1) the modifications to the interim rate structure and pricing rules contained in the First Reconsideration Order; (2) the most recent Commission decisions on general support facilities costs and the price cap index for 1993; and (3) the most recent changes in carrier network configurations. [14] Second, the Commission required these LECs to provide information specific to individual IXCs to enable them to make plans regarding their network configurations in light of the new transport rate structure. Specifically, the Commission required the provision of comparative billing information, or "shadow bills," containing estimates of the charges a customer would have received for a recent sample month had the interim transport rate structure and pricing system been in effect, as well as the customer's actual bill for that month under the equal charge rate structure for comparison purposes. [15]

6. In Section III, below, we first address some of the general arguments presented by petitioners against the transport tariffs and then address the principal substantive arguments presented regarding rate development and tariff terms and conditions with respect to the LECs as a group and as pertaining to specific carriers.

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[12] Transport Order, ¶ 5.

[13] See Transport Order, ¶¶ 67-69.

[14] See First Reconsideration Order, ¶ 65; Amendment of the Part 69 Allocation of General Support Facility Costs, Report and Order, CC Docket No. 92-222, 8 FCC Rcd 3697 (1993); 1993 Annual Access Filings, Memorandum Opinion and Order Suspending Rates and Designating Issues for Investigation, CC Docket No. 93-193, DA 93-762 (Com.Car.Bur. 1993).

[15] First Reconsideration Order, ¶ 66.

III. DISCUSSION

A. Local Transport Restructure Tariffs; General Contentions

7. Petitions. Several petitioners contend that the LECs failed to comply with the Commission's directive that they provide their IXC customers with adequate shadow bill information, and that the scanty information that was provided reveals such serious factual and rate development errors as to call into question the reliability of the data underlying the tariff filings. [16] WilTel claims that if the shadow bills are fundamentally inaccurate, the LECs' tariffs must be as well, and therefore the tariffs should be rejected and the LECs required to refile rates that reflect accurate demand data. [17] Others contend that the aggregate carrier impact estimates the LECs submitted earlier in this docket formed the basis for the Commission's decision to adopt the interim transport restructure and that the more recent impact statements are widely divergent from the earlier estimates, thus calling into question both the restructure and the tariff filings. [18] CGI argues that the tariffs violate Sections 202(a) and 203(c) of the Communications Act because comparative billing information required by the Commission was not provided in a complete and timely manner and the LECs are not ready to provision and bill under the restructure; tariffs should not be permitted to take effect until customers have received such information and have had time to reconfigure their networks in a more efficient, less costly manner. [19]

8. CompTel complains that the actual impacts on the third tier IXCs will be far greater than the Commission actually presumed. [20] Ad Hoc states that Ameritech, for example, estimates that nearly 50 percent of its switched access customers would have bill increases of over 50 percent. [21] WilTel argues that the impacts likely to result from the proposed rates are significantly more adverse to small IXCs than the impacts envisioned by the Commission last year, in part, from the Commission's failure to adopt improved permanent benchmarking standards to ensure reasonable rate relationships among DS1, DS3 and tandem switched transport services. [22] CompuServe argues that the proposed transport restructure rates are unjust, unreasonable and unreasonably discriminatory and will cause irreparable harm to data transaction processors such as CompuServe. [23]

9. In view of the foregoing, Ad Hoc requests, at a minimum, that the Commission establish a transition plan to require whatever rate increases result from the transport restructure tariffs be capped and phased-in over a two-year period. Goodyear requests that in addition, the

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[16] See, e.g., WilTel Petition at 6; CompTel Petition at 11 et seq.; Allnet Petition at 4-6.

[17] WilTel Petition at 9-11.

[18] See, e.g., MCI Petition at 7-9; Sprint Petition at 7-10.

[19] CGI Petition at 2-12.

[20] CompTel Petition at 8-10.

[21] Ad Hoc Petition at 5-7.

[22] WilTel Petition at 12-15.

[23] CompuServe Petition at 16, 19-21.

rule requiring waiver, until May 1, 1994, of certain non-recurring charges associated with access network reconfiguration be modified to extend over the entire phase-in period. [24]

10. In its comments filed following the November 15th revisions of several LECs, CompTel complains that with few exceptions, the tariff revisions make only modest incremental improvements to the tariffs filed on September 1, 1993. Although CompTel supports certain of these revisions, it continues strongly to oppose all the tariffs for the reasons stated in its petition to reject. [25]

11. Replies. The LECs defend their impact statements, shadow bills and cost support data and respond that the petitioners' allegations are neither correct nor do they constitute grounds for either rejection or suspension of the tariffs. [26] Pacific observes that the impact studies and the shadow bills are not contained in the tariffs and therefore neither can be used as grounds for a tariff protest. [27]

12. BellSouth asserts that the entire focus on impacts is misplaced. It observes that an impact statement attempts to show the effect of a re-pricing of local transport at a particular point in time. As the variables change with time, the absolute impacts also change. BellSouth explains that differences in the impact studies noted in the Transport Order and those filed in September, 1993 are primarily due to the local transport rate decreases which have occurred since the 1992 impact run was prepared. BellSouth explains that the 1992 run utilized July 1991 rate levels. Since those 1991 rates were in effect, BellSouth has made numerous and significant changes to its switched access rates, including rate decreases which have not been uniform for all rate elements and, thus, have impacted BellSouth's customers differently. Rates have been reduced for longer distance mileage bands more than for shorter distance ones, BellSouth adds, and such reductions had a favorable impact on small IXCs. However, when the transport restructure is superimposed on these interim decreases, the proportionate relative impact of repricing transport based upon 1992 special access rates under the restructure therefore appears greater for the smaller IXCs than for other groups when current impact is determined. In addition, BellSouth argues, inconsistencies from LEC to LEC are likely the result of a variety of factors which could reasonably vary from LEC to LEC, such as historical decisions made by LECs and customers (routing, technology and capacity), historical switched access rate levels and revenues, and September 1992 special access rate levels. [28] Bell Atlantic attributes the differences between the 1992 and 1993 impact runs primarily to the Commission's modifications of the original Transport Order's demand requirements. Bell Atlantic argues that the rules adopted in the First and Second Reconsideration Orders, requiring the use of historical

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[24] See Ad Hoc Petition at 7; CompuServe Petition at 21; Goodyear Petition at 11.

[25] CompTel 11/30 Comments at 1-5.

[26] See, e.g., Bell Atlantic Reply at 2-3; Southwestern Reply at 1-9; NYNEX Reply at 2-13; Pacific Reply at 2-6; US West Reply at 5-12.

[27] Pacific Reply at 2, citing 47 C.F.R. § 1.773(a) and quoting Associated Press v. FCC, 488 F.2d 1095, 1103 (D.C. Cir. 1971). Accord US West Reply at 3 n.6, citing United Video Inc., 49 FCC 2d 878, 880 (1974), recon. denied, 55 FCC 2d 516. See also RCA American Communications, Inc., 63 FCC 2d 728, 730 (1977); American Broadcasting Companies v. FCC, 663 F.2d 133, 138 (D.C.Cir. 1980).

[28] BellSouth Reply at 18-20.

rather than reconfigured demand, caused demand for facilities to be overstated and the interconnection charge to be understated, resulting in rates which had a greater impact on the small IXCs. [29]

13. The LECs also respond that the Commission should reject these generalized allegations as a basis for an extended delay of the transport tariff filings. They state that tariff filings that comply with the Commission's rules should be allowed to take effect as scheduled. [30] They generally argue that although end user petitioners have demonstrated that they will incur significant rate increases in some circumstances as a result of the restructure, the question of mitigating end user impacts is properly one for reconsideration, not tariff review. [31]

14. Southwestern is opposed to giving any delay or special consideration to different classes of customers. Southwestern argues that this would be in direct conflict with the Commission's long standing policy of generally treating all classes of customers alike in the provision of access service. [32] US West explains that the existing Feature Group A (FG A) and Feature Group B (FG B) rate structure is entirely usage-based with no facility charges, and, as a result, charges can be quite low for those customers with few MOUs per month. Under the restructure, these customers will incur a flat monthly charge for entrance facilities and direct trunked transport regardless of whether any usage is incurred. As a result, they will experience significant increases over previous rates. US West states that while this would appear unfair, it must be viewed against the fact that these same customers have been the beneficiaries of a cross-subsidy from higher usage customers under the existing equal charge-per-minute-of-use rate structure. [33] NYNEX observes that the petitioners' examples of large individual rate increases demonstrate the extent to which the equal charge rule has encouraged them to under-use facilities. NYNEX adds that the affected end users represent a small portion of the local transport market, and argues that the Commission should not defer the entire filing due to issues that affect only a small portion of the market. [34]

15. Finally, the LECs argue that WilTel's claim that incorrect benchmarking rules justify rejection is not a proper subject for a petition to reject a tariff. Pacific, for example, argues that it complied with the Transport Order's benchmarking requirements, and that WilTel's claim is not a proper subject for a petition to reject a tariff. [35]

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[29] Bell Atlantic Reply at 3-4.

[30] See, e.g., BellSouth Reply at 62.

[31] See BellSouth Reply at 70-72.

[32] Southwestern Reply at 10-11; accord Pacific Reply at 10-11 (questions who would pay for the amount not being recovered from small IXCs and end users if rates were phased-in).

[33] US West Reply at 27-28.

[34] NYNEX Reply at 11-15.

[35] See, e.g., Pacific Reply at 13; Central Reply at 7; United Reply at 7.

16. Discussion. In the 1992 Transport Order, the Commission found that the public interest required a prompt restructuring of LEC transport rates in order to advance the Commission's goals of stimulating economic growth and competition, goals which would ultimately benefit American consumers. The Commission found that the equal charge per-minute of use rate structure failed to create incentives for both LECs and IXCs to use and deploy networks efficiently, deprived LECs of the ability to compete with new entrants in their core service markets and thus prevented consumers from realizing fully the benefits of competition for local access services. Because of these significant detriments, the Commission decided that the equal charge rule should be replaced with a revised structure consisting of more equitable and cost-reflective rates. It observed that the uneconomic pricing signals created by the equal charge rule have caused wasteful use of LEC facilities and higher rates for ratepayers. For this reason, the Commission stated that the equal charge rate structure could not remain in place if customers are to receive the benefits of switched transport competition. At the same time, the Commission noted that it must proceed cautiously in this area in order to ensure that it did not endanger the availability of pluralistic supply in the interexchange market. It therefore adopted the interim approach of prescribing a transport restructure and establishing pricing rules to govern transport charges for two years, while it sought further comment on what long-term rate structure and pricing approach will be most reasonable in what would likely become, given the Commission's concurrent expanded interconnection policies, an increasingly competitive environment. [36]

17. The Commission reached these conclusions based on a thorough record, having received comments from all segments of the industry, including representatives of small IXCs. The record indicated that the new transport rate structure better reflects transport costs than does the equal charge rule. Ultimately, the new transport rate structure would give IXCs, as well as LECs, strong incentives to configure and use their telecommunications networks more efficiently, and thus lead to lower prices and increased demand for these essential services. The Commission identified the near-term move to the more cost-based interim transport restructure as being in the public interest due to significant harms flowing from the equal charge rule. Given that the Commission adopted the interim rate structure as a reasonable first step, we believe the Commission intended to move carriers and their access customers to the new rate environment without the need for any additional delay or phase-in plans. The Commission specifically included, as part of the restructure, the requirement that LECs waive, until approximately six months after the implementation of the interim rate structure, certain non-recurring charges "[i]n order to encourage IXCs to reconfigure their networks to make them more efficient and to reduce the expense of network reconfigurations induced by the transport rate structure change." [37]

18. The petitioners have raised concerns on the question of whether the impact estimates and shadow bills prepared by the LECs are adequate, and whether any problems in the impact estimates and shadow bills indicate problems with the proposed rates. Although the sufficiency of the comparative bills and impact statements is not determinative of the lawfulness of the tariffs, we have carefully examined these claims, the LECs' responses, and the data underlying both the impact statements and the proposed rates, and conclude that the LECs have adequately explained the differences between the 1992 and 1993 impact statements as well as

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[36] See Transport Order, ¶¶ 1-3.

[37] Transport Order, ¶ 60.

the differences between their September 1993 and November 1993 impact estimates. [38] They have also demonstrated that any problems they might have experienced in generating either the initial impact statements or the shadow bills were (1) later rectified and (2) did not affect the data the LECs used to calculate their proposed rates. Tariffing data were drawn from their actual billing data as opposed to the billing models that were used to calculate the impact estimates. Unless otherwise indicated below, the LECs all followed the Transport Orders' rules for determining initial pricing levels by basing their prices for the facilities-based rate elements on the rates for their equivalent special access offerings as of September 1, 1992 and by satisfying the benchmark DS3-to-DS1 ratio of 9.6-to-1; demand levels and the interconnection charge were also derived according to the interim restructure rules.

19. Our review of the most recent data shows that the anticipated nationwide impacts on small IXCs are consistent with the projections that the Commission noted in the Transport Order. [39] At that time, the LECs projected an average 1.8% increase in small IXCs' total interstate switched access costs and a decrease of 0.6% in AT&T's costs; the current estimates from the same group of LECs are a 1.8% increase for the small carriers and a 0.9% decrease for AT&T. Last year, a 0.9% increase was predicted for MCI and Sprint, the LECs now predict a 1.3% decrease for those two companies. The September 1993 impact statements projected substantially higher rate changes for the small IXCs than anticipated. It now appears that these projections were based on erroneous data and modeling techniques. We believe that the November 1993 revised impact estimates that the LECs filed with the Commission are significantly more reliable than the data provided earlier, and indicate impacts consistent with those projected in September 1992.

20. The Commission, however, was always aware that the transport rate restructure would affect individual customers differently. The transition from the equal charge per-minute rate structure to the new rate structure, which includes some flat-rate charges, inevitably means that customers with less efficient usage will face higher than average rate changes. The actual individual impacts, however, may well be less substantial than they appear from the current projections. Generally, the individual companies most affected have very low usage levels, so that while the percentage level of change from the equal charge structure appears great, the dollar amounts tend to be far smaller. Moreover, the current impact estimates reflect historical network configurations, whereas nearly all IXCs can reconfigure their networks to be more efficient and less costly than if their networks remain as they were under the equal charge rate structure. Small IXCs can reduce their costs by sharing facilities or reselling the services of other carriers.

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[38] In view of certain inconsistencies and errors in the data and modeling that formed the basis of the September 1993 data runs, the Common Carrier Bureau's staff directed the LECs to file corrected impact data with their IXC customers and the Commission. In addition, due to widespread dissatisfaction expressed by IXCs with the comparative billing information provided by the LECs in their initial set of shadow bills, Bureau staff also directed the LECs to generate new and far more detailed comparative billing information for their IXC customers. These revised statements and bills were generated and disseminated by mid-November 1993. LECs were also directed to file revised tariff transmittals if, in the course of re-doing their shadow bills and impact estimates, they discovered errors in their rate calculations, particularly with respect to their demand data for both facilities and minutes-of-use. As a result of this exercise, twelve LECs filed various tariff revisions on November 15, 1993; Bell Atlantic and GTE filed revisions based upon revised demand data.

[39] See Transport Order, ¶¶ 65-69.

21. The Transport Order included requirements intended to mitigate impacts on the smaller long distance companies. For example, LECs are permitted to recover only 20 percent of their current tandem revenue requirement through the tandem switching charge in order to ease the impact of the restructure on the small IXCs that use primarily tandem switched transport. [40] Thus, in establishing this rate restructure and setting the pricing rules, the Commission was very careful to balance the concerns of the LECs and all their access customers. In addition, the Commission has strongly encouraged the LECs to assist their customers in developing reconfiguration plans, and many of the carriers appear to be following this directive. To this end, we have directed the LECs to refer certain billing issues arising from shared facilities arrangements under the restructure to the industry's Ordering and Billing Forum (OBF) for prompt resolution, and to report back to us on their progress. [41]

22. In any event, the sufficiency of the shadow bills and impact statements is not controlling on whether the tariffs are lawful. [42] The efficacy of the transport tariff filings was not made conditional upon the LECs' successful compliance with these additional reporting requirements. The shadow bills were intended as an aid to the LECs' customers' efforts to reconfigure their facilities requirements in the most cost effective and efficient way, based upon detailed statements of the charges they would otherwise be assessed under the new structure. The Commission did not envision that all customers would have reconfigured their networks prior to the effective date of the tariffs, as is evidenced by its requirement that non-recurring charges associated with the local transport reconfigurations be waived until May 1, 1994. [43] Similarly, the Commission initially required impact estimates to be filed as a check on its assumptions about the impacts of the proposed rate restructure. Contrary to MCI's suggestion, [44] the Commission did not base its restructure decisions on the projected impacts, but rather, as stated in the Transport Order, "[o]ur decision to adopt a new rate structure and pricing approach for transport is based on the policy considerations discussed [herein]." The Commission required the submission of revised impact statements in the First Reconsideration Order following the modifications and clarifications to the pricing and rate structure rules it was adopting in July 1993, to assure that these and other changes occurring with the passage of time would not result in any substantial, unanticipated changes. [45]

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[40] See Transport Order, ¶ 59; Further Notice, ¶¶ 130-32; First Reconsideration Order, ¶ 43-45.

[41] See infra paragraphs 71-72.

[42] See, e.g. CGI Petition at 2-12.

[43] See First Reconsideration Order, ¶ 66, "Information for Planning Purposes," (provision of information specific to individual IXCs by the largest LECs would be useful in enabling IXCs to make plans regarding their network configurations in light of the new transport rate structure; in addition, LECs providing comparative billing information must either file with the Commission aggregate data summarizing the information provided to individual IXCs, broken down by large, medium and small IXCs, or present convincing evidence to the Common Carrier Bureau demonstrating why it is unable to do so).

[44] See MCI Petition at 7-9.

[45] See First Reconsideration Order ¶ 65.

23. The Commission established detailed requirements for the local transport restructure tariff filings. Some of the standards that the Commission established, if met, carry with them a presumption of reasonableness. [46] Under these circumstances, petitioners have the burden to demonstrate a high probability of unlawfulness of each tariff filing to which they object. [47] Broad generalizations, such as those regarding the statements of the impacts of the rate restructure, the lack of detail in the initial set of shadow or comparative bills, or a hypothetical lack of readiness on the part of LECs to provision and bill service, are not relevant to the lawfulness of the transport tariff filings, and, thus, do not meet this burden. AT&T's concerns about the revenue neutrality of the filings must be addressed through its more particularized allegations regarding a specific carrier's tariff shortcomings.

24. General challenges to the rate structure and pricing rules upon which the interim transport tariffs are based provide equally insufficient grounds upon which to protest tariff filings. Although WilTel argues that the tariffs demonstrate that improved permanent benchmarking is necessary to prevent discrimination and ensure that tandem switched rates are reasonable, WilTel acknowledges that this is an issue it has previously raised in the transport rulemaking docket and currently in petitions for reconsideration. [48] This is not an issue which can justify rejection of a tariff. The substantive issue should be addressed when WilTel's Petition for Reconsideration, CC Docket No. 91-213 (filed December 21, 1991) is considered. Similarly, CompuServe's charge of unreasonable discrimination against Feature Group B users is, as CompuServe indicates, primarily directed at the transport restructure's imposition of flat-rated entrance facility charges, not at the actual prices or tariff terms and conditions implementing the restructure. Such challenges cannot be entertained in tariff protest proceedings, where the issue to be resolved is whether the filing carrier has followed the rules established in a rulemaking order.

B. Rate Development

25. In general terms, local transport rates under the restructure were to be developed in four steps: (1) September 1992 special access rates were to be multiplied by the change in the price cap index (PCI) to derive entrance facility and direct-trunked transport rates; (2) tandem-switched transport rates were to be based on DS3 and DS1 direct trunked transport rates, converted to a voice grade equivalent basis, assuming 9000 MOU-per circuit, and weighted according to the LEC's relative proportion of fiber and copper facilities as reported in ARMIS; (3) the tandem switching charge was to be calculated by dividing 20 percent of access tandem revenue requirement by total tandem-switched MOU; and (4) the interconnection charge was to equal base year 1992 local transport revenues minus revenues from the three facilities-based rate elements described above, divided by the total interstate local switching MOU. The petitioners allege that there are several instances in which the LECs made

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[46] See e.g., 47 C.F.R. Sections 69.108 (DS3 to DS1 benchmark ratio); 69.110 (b)(1) (entrance facilities charges); 69.112(b)(1) (direct-trunked transport charges). See also First Reconsideration Order at paras. 28-29 (application of special access rates "for multiplexing and other features and functions that are needed for switched transport").

[47] In this regard, AT&T's simply listing, in an appendix, the name and transmittal numbers of every LEC filing restructured transport tariffs, without any additional allegations as to the reasons why the vast majority of these tariffs should be suspended, is patently insufficient to satisfy the petitioner's burden of pleading and proof.

[48] See WilTel Petition at 12-15.

methodological errors or used data that are incorrect, unreasonable, or unjustified in computing these rate elements.

1. Interconnection Charge

a. Demand Calculations.

26. Petitions. Petitioners observe that LECs appear to have made different assumptions in mapping historical demand to the restructured rate elements. They claim that some LECs have used historical demand quantities while others utilized optimized demand. AT&T states that it prefers the "historical" approach (used by Bell Atlantic, Southwestern) over the "optimized" approach (used by NYNEX). CompTel claims that the LECs in general do not know the percentage of tandem, as opposed to direct trunked, demand. Sprint argues that one of the most glaring instances of probable error in the mapping process involves the BOCs' estimates of DS3 facilities in their networks, in particular, the filing of Bell Atlantic. [49]

27. AT&T argues that the variety of inconsistent approaches used by the LECs to determine historical facilities' demand raise substantial concerns of verifiability and consistency with the First Reconsideration Order. AT&T notes that a straightforward way to determine historical facilities demand in compliance with the First Reconsideration Order is the method used by Bell Atlantic and Southwestern. [50] NYNEX, in contrast, began with July 1993 trunk demand at the rate element level, converted that to facilities demand, and, according to Sprint, on the assumption that certain facilities would be "optimized" by IXCs, reconfigured the actual facilities demands. [51] AT&T suggests that certain carriers' tariffs should be investigated to determine whether the LECs have manipulated demand levels to maximize the interconnection charge. In particular, AT&T argues that the inconsistent procedures used by the LECs for recasting subsequent demand into 1992 levels should be investigated to determine whether those accurately produce the historical baseline demands required by the Commission and do not improperly inflate the interconnection charge of the respective LEC. [52] Sprint requests that at a minimum, the LECs should be required to describe in greater detail the assumptions underlying their network mapping analyses. [53]

28. Additionally, AT&T requests that the tariffs of Anchorage, Citizens, and Roseville be investigated to determine whether these carriers have manipulated demand levels in a manner that would impermissibly maximize the interconnection charge. AT&T observes that these carriers have each used prospective revenue requirements, but historical facilities'

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[49] See, e.g., AT&T Petition at 15-18; Sprint Petition at 18-20; CompTel Petition at 18.

[50] AT&T Petition at 15-18; see, e.g., Bell Atlantic D&J, Sec. 3.2, pp. 3-1, 3-3; and First Reconsideration Order, ¶ 51.

[51] Sprint Petition at 20; see NYNEX D&J, p. 35.

[52] AT&T Petition at 15-18. The carriers are Ameritech; BellSouth; NYNEX; Pacific; United; and Central.

[53] Sprint Petition at 20.

demands to compute the interconnection charge. [54] MCI challenges the tariffs of CBT and NECA on the ground that these filings are erroneously based on projected demand. [55]

29. Replies. With a few exceptions, the price cap LECs have generally defended their demand data as calculated in accordance with the transport restructure requirements. For example, BellSouth, Central, United, Southwestern, and Pacific defend their facilities demand mapping as historically accurate and in no need of revision. [56] NYNEX defends its data, but it does admit to "grooming" of "grossly under-utilized" DS3s to DS1s in calculating its historical facilities demand. [57] Ameritech states that it corrected the facilities demand errors it found in its original filing with its September 15th revision. [58] Anchorage admits that it initially used prospective facilities demand for some rate elements and historical demand for others in contravention of the Commission's rules. However, in its November 15th revision, Anchorage corrects this error and uses historical demand for all rate elements. [59] Bell Atlantic, in its reply, admits to errors in facilities classifications in its original filing, and in its November 15th revisions, has indicated that it corrected those errors. [60] SNET, GTE and NECA also revised their demand data in their respective November filings. [61]

30. The rate-of-return carriers respond that they have calculated their local transport rates in a manner fully consistent with the Commission's orders in this proceeding. Roseville points out that rate of return ratemaking is an inherently prospective procedure, and the Commission's rules reflect this. Part 69 revenue requirements must be prospective in accordance with Section 61.38 of the rules; nothing in the First Reconsideration Order altered this requirement, and Roseville's practice is consistent with the rules. It also notes that this practice is consistent with the Commission's goal of revenue neutrality, and the TRP Order. [62]

31. Discussion. The price cap LECs were required to use historical demand for all demand components of the interconnection charge formula. [63] In recasting 1992 demand into the new rate elements, most companies did not have complete historical data available, and thus

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[54] AT&T Petition at 15-16 & n.20.

[55] MCI Petition, App. A. at 20, 23.

[56] BellSouth Reply at 22-24; Central Reply at 4; United Reply at 4; Southwestern at 12-15, 18; Pacific Reply at 9.

[57] NYNEX Reply, Exh. 8. NYNEX has revised its demand calculations in its December 23rd filing to eliminate the grooming.

[58] Ameritech Reply at 15.

[59] Anchorage Reply at 1-2.

[60] Bell Atlantic Reply at 3 n.8.

[61] See SNET Reply at 9.

[62] Roseville Reply at 3-5; Citizens Reply at 2. Accord NECA Reply at 2-4; Lincoln Reply at 1-2; Anchorage Reply at 2; CBT Reply at 2.

[63] See Second Reconsideration Order, ¶ 5.

were forced to use some estimation technique. Initial errors appearing in the data of several of the price cap LECs appear to have been identified by the affected LECs and to have been corrected. [64] In contrast, we interpret the requirement of historical demand not to apply to rate-of-return carriers, who, consistent with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, are permitted to use projected, but not reconfigured, demand. [65] Accordingly, we conclude that no question has been presented as to the way in which demand was calculated that requires rejection or investigation at this time.

b. Treatment of Waived Non-recurring Charge Revenues in the Interconnection Charge

32. Petitions. AT&T and MCI claim that certain LECs have apparently computed their interconnection charges in a manner that will recover non-recurring charge (NRC) revenues through their interconnection charge, thus undermining the waiver requirement. [66] AT&T suggests that the Commission should require all LECs to follow either the Pacific or GTE methods of excluding NRC revenues from their interconnection charge or 1992 baseline revenue requirements. In addition, AT&T requests an investigation into whether it is proper that the waived NRCs be recovered through the interconnection charge; whether any adjustment to the interconnection charge is necessary upon expiration of the waiver period; and whether all LECs should be required to exclude NRC revenues from their 1992 baseline revenue requirements. [67]

33. Replies. Several LEC defend their inclusions of the subject NRC revenues in calculating the interconnection charge as necessary in order to maintain revenue neutrality. [68] Other carriers state that they have either directly or indirectly excluded those from their revenue requirements. [69]

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[64] See, e.g., Bell Atlantic 11/15 revisions. NYNEX has also revised its facility demand calculations to use historical rather than optimized demand in its December 23rd revisions.

[65] See Commission Requirements for Cost Support Material To Be Filed With Local Transport Tariffs, Order, DA 93-1029 (TRP Order), and compare TRP Order at Appendix B, Section 69.124 Interconnection Charge, note (specifying that for price cap companies, "Demand is historical 1992 base period demand restated in terms of the new rate structure. Rates are the rates proposed in this filing," with id., at Appendix C, Section 69.124, note (specifying only that "Rates are the rates proposed in this filing," without specifying demand requirement). See also Second Reconsideration Order, ¶ 5 (describing historical demand requirement in terms of price cap carriers).

[66] AT&T Petition at 22; MCI Petition at App. A. Those LECs are: Southwestern, Ameritech, BellSouth, NYNEX, Bell Atlantic and US West.

[67] AT&T Petition at 22-23

[68] These include: Ameritech Reply at 11; NYNEX Reply, Exh. 12 at 2-3; and SNET Reply at 3.

[69] See BellSouth Reply at 36-38; Central Reply at 6; United Reply at 6; and GTE Reply at 16.

34. Discussion. In the Transport Order, the Commission ordered the LECs to waive certain non-recurring charges for a six-month period after the restructured tariffs took effect in order to encourage IXCs to reconfigure their networks to make them more efficient and to reduce the expense of network reconfigurations induced by the transport rate structure change. [70] Those LECs who had included waived NRC revenue requirements in calculating their interconnection charge for their September 1 tariff filings have since removed them and have recalculated their interconnection charges. [71] Accordingly, we conclude that no question has been presented as to the inclusion of waived non-recurring charges in the interconnection charge calculation that requires rejection or investigation at this time.

2. Tandem Switched Transport

35. The Commission specified that the restructured tandem-switched transport rate should be based on an average of the DS1 and DS3 rates used for direct-trunked transport, weighted to reflect the relative DS1 and DS3 circuit mix in the tandem-to-end-office link. This was to be accomplished by converting the DS1 and DS3 direct-trunked flat rates into per minute rates, and then weighting those rates by the DS1/DS3 circuit mix using the fiber/copper facilities ratio from ARMIS as a proxy for that mix. [72] Petitioners assert that the LECs' tandem switched transport rates are improperly calculated for several reasons: (1) the tandem revenue requirements are based upon questionable overhead loadings; (2) understated tandem switching demand; (3) overstated tandem revenue requirements including costs associated with Signalling System 7 (SS7) and line information database (LIDB); (4) copper/fiber ratios used by several LECs that are inconsistent with ARMIS data; (5) understated tandem switched transport rates due to inclusion of the wrong number of multiplexer charges; and (6) inconsistencies in rate development and rate application regarding tandem-switched minutes which have zero local transport miles. [73]

a. Overhead Loading Calculations

36. Petitions. Allnet complains that except for Bell Atlantic and Pacific, no other LEC provided details how the tandem costs were allocated. Allnet maintains that no analysis of the allocation and rate development can therefore be made, and that for this reason alone, the tariffs should be rejected. [74] CompTel and WilTel assert that although cost support is skimpy, it appears that the LECs have improperly calculated the tandem switching charge to recover 100 percent of the overhead expenses they allocated to the tandem switch, while recovering 0 percent of those overhead expenses from the interconnection charge. [75]

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[70] Transport Order, ¶ 60; 47 C.F.R. § 69.126.

[71] Ameritech, NYNEX and SNET have removed these revenues from their interconnection charge calculations in their December 23rd revisions.

[72] See Transport Order, ¶¶ 55-58; First Reconsideration Order, ¶¶ 34, 38.

[73] See CompTel Petition at 20-25; WilTel Petition at 15-18; Allnet Petition at 6-10; AT&T Petition at 29-31; Sprint Petition at 21-27; and MCI Petition at 12-13.

[74] Allnet Petition at 6-10.

[75] CompTel Petition at 21-25; accord MCI Petition at 12-13; Sprint Petition at 22-23.

37. Replies. The LECs generally defend their overhead loadings as being properly calculated according to the requirements of the Transport Orders and Parts 36 and 69 of the Commission's Rules, 47 C.F.R. Parts 36 and 69. [76] Ameritech, for example, explains that in developing the tandem revenue requirement, it included Central Office Equipment (COE) plant-specific expenses and COE depreciation expenses as associated expenses. Ameritech notes that the Commission stated specifically that the tandem revenue requirement could be computed in a straightforward manner by adding the same proportion of overhead tandem investment and associated expenses as the amount of overhead loaded on the transport category as a whole. [77] Ameritech asserts that it used this approach in allocating its overhead to the tandem revenue requirement, and that its rate of overheads thus computed is consistent with the rate of overheads to total transport investment filed in its 1992 ARMIS reports. [78]

38. Discussion. As the LECs have observed, the Transport Order and First Reconsideration Order stated that the tandem charge sub-element of tandem switched transport would be presumed reasonable if it were set to recover 20 percent of the current Part 69 tandem revenue requirement, calculated based on the interstate allocation of Central Office Equipment (COE) Category 2 costs assigned to transport. [79] In the First Reconsideration Order, the Commission acknowledged that the rules do not explicitly define a methodology for computing a tandem revenue requirement, but concluded that such a requirement could be computed in a straightforward manner by adding the same proportion of overhead to tandem investment and associated expenses as the amount of overhead loaded on the transport category as a whole. It clarified that for purposes of calculating the tandem charge in the interim transport plan, the Transport Order contemplated the use of the Part 69 tandem revenue requirement, which embodies fully distributed costs. In recognition of the fact that there remained outstanding questions regarding the costs to be recovered through the tandem charge, the Commission limited recovery of the tandem revenue requirement to 20 percent for the interim period. [80]

39. We have reviewed the transmittals, all associated pleadings and the underlying data at issue. We conclude that no compelling argument has been presented that there are any errors with respect to calculation of overhead loadings justifying rejection or suspension.

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[76] See, e.g., Ameritech Reply at 10, Bell Atlantic Reply at 7; GTE Reply at 19-20; Lincoln Reply at 3; NYNEX Reply, Exh. 10 at 1-4; Pacific Reply at 8; Southwestern Reply at 20-22; US West Reply at 13-14. Ameritech (Exhibit A) and Southwestern (Appendix A) provide additional details related to their overhead loadings.

[77] See First Reconsideration Order, ¶ 45.

[78] Ameritech Reply at 10.

[79] See Transport Order, ¶¶ 23-25, 59; First Reconsideration Order, ¶ 43.

[80] See First Reconsideration Order, ¶ 45. See also Transport Order, ¶ 25; Further Notice, ¶¶ 130-32.

b. Demand, Revenue Requirement and Other Rate Calculations

Petitions.

40. Overstated revenue requirement. Sprint, Allnet and MCI contend that most of the LECs have not removed SS7 and LIDB revenue from the tandem revenue requirement and that this failure results in double recovery. [81] Sprint observes that Bell Atlantic specifically asserts that it removed SS7 costs; whereas Nevada specifically included these SS7 tandem costs. According to Sprint, most of the other LECs (e.g., US West, Ameritech, Pacific) have failed to adequately document the claimed tandem revenue requirement used to compute the tandem charge. [82]

41. Multiplexing charges. AT&T observes that with the exception of BellSouth, which correctly included two multiplexer charges in its tandem switched transport rate, most of the LECs have included only one multiplexer charge, and Nevada Bell has included none. AT&T argues that the LECs should include two multiplexing charges in the tandem switched transport rate, and that the Commission should investigate whether tandem switched transport charges have been properly developed. [83]

42. MCI, Sprint and several other petitioners, to the contrary, argue that only one multiplexer charge should be included. Sprint, accordingly, claims that BellSouth made a methodological error in computing its tandem-switched termination rate. According to Sprint, BellSouth included two DS3-to-DS1 multiplexer charges, as well as a DS1-to-analog multiplexer charge. Sprint claims that at most, only one DS3-to-DS1 multiplexer charge should have been included. Sprint argues that BellSouth's practice is unexplained and is contrary to that of all of the other BOCs and of the Commission. [84] MCI contends that LECs should not be allowed to recover the costs of DS1 to DS0 multiplexing for facilities terminating in analog offices. [85]

43. Understated demand. Sprint argues that based on data contained in the supplemental Tariff Review Plans (TRPs), it appears that at least three BOCs -- Bell Atlantic, Pacific and Nevada -- have underestimated the number of tandem-switched minutes of use. All of the other BOCs indicate that they routed over 30 percent of their switched transport minutes through an access tandem. In contrast, Bell Atlantic, Pacific and Nevada estimate that only 19.44 percent, 19.83 percent and 9.84 percent respectively of their total local transport minutes were switched through a tandem. Sprint alleges that these estimates are clearly too low because, nationwide, AT&T alone routes 20 percent of its traffic through tandem switches. Sprint submits that if tandem-switched minutes are too low, the tandem switching charges will

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[81] Sprint Petition at 22; MCI Petition, App. A at 2; Allnet Petition at 10.

[82] Id. at 23.

[83] AT&T Petition at 29-32.

[84] See, e.g., Section 69.108 (use of a single multiplexer charge in the DS3-to-DS1 benchmark calculation). Sprint claims that removal of these excess multiplexer charges will reduce BellSouth's tandem switched termination rate in half. Sprint Petition at 25-26; accord CompTel Petition at 40; Allnet Petition, App. 1 at x.

[85] MCI Petition at 10-11 and App. A at 1.

be too high. [86] Allnet complains that most, if not all LECs, have substantially understated local switching minutes-of-use when developing both the tandem switching rate and the interconnection charge. Allnet contends that the LECs should have included LEC interstate intraLATA MTS Toll MOU, the local transport billed portion of cellular minutes, and meet point billed MOU in calculating the tandem switching charge. Allnet alleges that exclusion of these MOU results in artificially inflated tandem switched transport and interconnection charge charges. [87]

44. Copper/Fiber mix. Sprint and CompTel assert that many LECs failed to follow the Commission's directive that a Tier 1 LEC's initial tandem switched transport rates would be presumed reasonable if they are derived using the fiber/copper mix of interoffice switched transport facilities reported through ARMIS as a surrogate for the actual mix of DS3s and DS1s, and therefore erred in deriving their tandem switched transport rates. [88] Sprint claims that four BOCs (Bell Atlantic, BellSouth, Pacific and NYNEX) included radio links in their calculations (i.e., they treated radio like copper or fiber). Sprint also identifies discrepancies in the numbers submitted by Ameritech and Nevada. [89]

45. Zero mile rates. Sprint argues that there is an apparent discrepancy in the way in which various LECs will treat tandem switched transport minutes that have zero local transport miles. If an access tandem has the same V&H coordinates as a serving wire center (in Class 4/5 offices), local transport miles will be zero. Without identifying the carriers, Sprint asserts that some LECs have apparently assumed for ratemaking purposes that such minutes will be assessed both the tandem switching charge and the termination charge (the per-minute per-mile facility charge would be zero). However, Sprint says, for billing purposes, these LECs apparently will assess only the tandem switching charge. Sprint states that inconsistencies in rate development and billing are confusing and lead to either over- or under-recovery of costs. [90]

Replies

46. Overstated revenue requirement. A majority of the filing LECs state that they have properly treated SS7 costs in compliance with paragraph 25 of the Transport Order. [91] BellSouth, for example, explains that the Commission's rules clearly specify the means by which the tandem revenue requirement is to be calculated, and they do not provide for the separate removal of costs associated with SS7 services. BellSouth states that the Commission

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[86] Sprint Petition at 21-22, citing AT&T Reply Comments, submitted March 22, 1991 in CC Docket No. 78-72, Phase I, at p. 10.

[87] Allnet Petition at 10-12.

[88] Sprint Petition at 23-26; CompTel Petition at 21-25. See First Reconsideration Order, ¶ 38.

[89] Sprint Petition at 24; CompTel Petition at 21.

[90] Sprint Petition at 27.

[91] See, e.g., BellSouth Reply at 34; Central Reply at 6; GTE Reply at 18; Lincoln Reply at 3 (Lincoln has no SS7 costs); NECA Reply at 5 n.11; NYNEX Reply, Exh. 10 at 4; Pacific Reply at 6; United Reply at 6.

recognized that questions exist regarding what costs should be included in or excluded from the tandem revenue requirement, as well as the amounts thereof, and that there was a need to ease the impact of the restructure on small IXCs. As a result, BellSouth concludes, the Commission required LECs to compute the tandem charge based upon only 20 percent of the current tandem revenue requirement. [92]

47. Ameritech, on the other hand, states that it has excluded SS7 costs. [93] Several LECs state that they have excluded LIDB from the tandem revenue requirement. [94] NYNEX and Southwestern state that they have not taken additional steps to exclude LIDB costs, but note that LIDB revenues are not part of transport revenues, and thus there is no double recovery. [95]

48. Multiplexing charges. BellSouth defends its inclusion of more than one multiplexing charge, arguing that the number of DS3/DS1 multiplexers should equal the number of DS3 entrance facilities, which is true of BellSouth's tariff. BellSouth states that this is in recognition of the fact that any DS3 facility must at some point be multiplexed down to a DS1 level, whether at the serving wire center, the access tandem, a hub, or an end office. BellSouth also agrees with AT&T that additional multiplexers are used on the end office side of the tandem circuit, and whenever the end office is analog and the transport facility is digital. BellSouth therefore included charges for the additional multiplexing at the tandem and for the additional DS1/DS0 multiplexing for analog offices. BellSouth cites paragraph 28 of the First Reconsideration Order to justify these charges. [96]

49. US West and NYNEX state that they have each only applied one multiplexing charge in developing their rates because that is what the Commission directed. [97] Both add that they agree with AT&T that two DS3/DS1 multiplexers more properly reflect the underlying costs on a tandem routed facility because digital end office and tandem switches only operate with DS1 circuit terminations. They add that if required, they will recompute their tandem switched and interconnection charge rates to reflect the use of two multiplexer charges in their rates. [98] GTE, to the contrary, claims that it did not apply the multiplexing charge to any multiplexing performed at the end office on tandem switched services and no tariff modifications should be required. [99]

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[92] BellSouth Reply at 34; citing Transport Order. ¶¶ 25, 131-32.

[93] Ameritech Reply at 9.

[94] See, e.g., Ameritech Reply at 9; SNET Reply at 4.

[95] NYNEX Reply, Exh. 10 at 4-5; Southwestern Reply at 21-22. Accord United Reply at 11; CBT Reply at 3. (LIDB costs are assigned to local switching, not transport).

[96] BellSouth Reply at 27-28.

[97] US West Reply at 17; NYNEX Reply, Exh. 10 at 7. See Transport Order, ¶ 56 n. 113.

[98] NYNEX Reply, Exh. 10 at 8; US West Reply at 17 n.49.

[99] GTE Reply at 23.

50. Understated demand. Most companies defend their MOU data as properly accounting for cellular, interstate intraLATA toll, and meet point billed minutes. [100] NYNEX admits that it erred when it assumed that corridor traffic have the same percent tandem MOU as other traffic when in fact these calls are all tandem routed. NYNEX argues that this offsets its meet point billed demand error. [101] US West has revised its tandem switching and interconnection charges based upon inclusion of US West's 1992 interstate intraLATA MTS toll MOUs. [102] Bell Atlantic defends its low percentage of tandem traffic as being the result of high route density in its territory, making it more economical for IXCs to use direct trunked transport. [103] Pacific and Nevada also claim that their percentages of tandem are based on actual MOU and are thus correct. [104]

51. Copper/Fiber mix. In their replies several LECs admitted to using an incorrect fiber/copper facilities ratio and have subsequently made corrective filings. [105] GTE and NYNEX, on the other hand, defend including radio links with copper because radio circuits are functionally equivalent to wire or fiber facilities. [106]

52. Zero mile rates. BellSouth admits an error in including a termination charge for zero miles of transport, and has eliminated this in its November 15th filing. [107] Southwestern defends its treatment and explains that for zero miles it assesses a tandem switching charge but not tandem-switched transport charges. [108]

Discussion.

53. Overstated revenue requirement. In the Transport Order, the Commission explained that the tandem charge initially will recover only 20 percent of the tandem revenue requirement in order to ease the impact of the restructure on IXCs that use tandem switched transport. [109] The remainder of the revenue requirement is to be recovered through the

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[100] See. e.g., Ameritech Reply at 14-15; Southwestern Reply at 12-15.

[101] See NYNEX Reply, Exh. 12 at 5.

[102] See US West Transmittal No. 417, D&J at p. 1-3.

[103] Bell Atlantic Reply at 6.

[104] Pacific Reply at 7.

[105] Ameritech admits to using the wrong copper/fiber ratio and has corrected the error in its November 15th filing. See Ameritech Reply at 14. Nevada admits to calculating the ratio incorrectly and has corrected this in its November 15th revised filing. See Pacific Reply at 7. BellSouth, in its reply, states that the inclusion of radio has minimal impact, but removed radio links from its rate calculation in its November 15th filing. See BellSouth Reply at 29.

[106] See GTE Reply at 20-21; NYNEX Reply, Exh. 10 at 6-7.

[107] See BellSouth Reply at 29-30.

[108] See Southwestern Reply at 14.

[109] Transport Order, ¶ 25.

interconnection charge. Because the Commission knew that there were some questions about the costs recovered through the tandem revenue requirement, in particular, SS7 costs, the Commission adopted the 20 percent tandem revenue requirement for the interim period. This limitation ensures that access customers would not be unfairly billed for an excessive tandem charge. At the same time, the Commission sought further comment on what portion of the tandem revenue requirement is tandem-related and should therefore be paid by tandem switched transport users, and what tandem-related costs are not now included that ought to be recovered through the tandem charge. [110] Challenges to the tandem revenue requirement would be properly directed to further rulemaking, not tariff, proceedings.

54. Multiplexing charges. The Commission determined that interoffice transmission charges would be presumed reasonable if set at a per-minute equivalent of the voice-grade, DS1 and DS3 rates for direct-trunked transport, weighted to reflect the LEC facilities between the tandem and end office used in the provision of tandem-switched transport, and calculated using a loading factor of 9000 MOU per-month per-voice-grade circuit. The Commission noted that like special access interoffice mileage charges, tandem switched transport would then have two charges related to transmission if the LEC chooses to have distance-sensitive rates: a non-distance sensitive per-minute charge and a distance-sensitive per-minute charge. The non-distance-sensitive charge would recover the costs of certain circuit equipment at the ends of the interoffice transmission path, including the multiplexing equipment needed to interconnect DS3 transmission facilities with the end office switch. The per-minute-mile charge would recover the costs associated with the transmission facilities between the endpoints of the interoffice circuit. [111] Pursuant to these requirements, LECs should have included only one multiplexing charge in developing their tandem switched rates. [112]

55. Understated demand/Copper-Fiber mix/zero mile rates. US West, in its November 15th filing corrected its rates to use the copper/fiber facilities mix from ARMIS; In its December 23rd revisions, NYNEX has revised its rates to correct its treatment of corridor minutes, meet point billed minutes and its copper/fiber facilities ratio. [113] Bell Atlantic, GTE and Pacific also removed radio links from their copper/fiber ratios in their December 23rd revisions. Three other LECs revised their rates in their November 15th filings and corrected their copper/fiber facilities ratios: BellSouth (removing radio links); Ameritech (correcting ratio); and Nevada (correcting ratio). BellSouth revised its rates in its November 15th filing to remove application of the facility termination charge to transport facilities of zero miles. BellSouth adjusted its demand and appropriate rates accordingly to reflect removal of the application of the Facilities Termination Charge for zero miles. [114]

56. Based upon our review of the pleadings, transmittals and the foregoing revisions and clarifications, we conclude that no questions have been presented that the tandem switched transport rates require rejection or suspension.

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[110] See Further Notice, ¶¶ 130-32.

[111] Transport Order, ¶ 56 n.113; Section 69.111 (c)(1) and (2).

[112] BellSouth has revised its tandem switched rates to eliminate the costs of additional multiplexers in its December 23rd revised filing.

[113] See NYNEX 12/23 revisions to the local transport restructure.

[114] See BellSouth D&J filed November 15th at 2.

C. Terms and Conditions

1. Billing System Limitations Resulting in Service Restrictions and Customer Reporting Requirements

a. Restrictions on Access Tandem Trunking Options.

57. Petitions. Petitioners argue that several LECs have placed restrictions on tandem trunking options, such as refusing to permit an IXC to order both direct trunked and tandem switched transport between a specific serving wire center and an access tandem. [115] They argue that such restrictions are neither explained nor justified and raise substantial questions of lawfulness. MCI argues that this restriction limits diversity and network reliability, and requests that it be explained. AT&T also notes that in its September 1 filing, US West failed to provide for a direct trunked option to and from an access tandem. [116]

58. Replies. The LECs respond that such limitations are necessitated by technical limitations in their billing systems. [117] Pacific explains that when a call is switched at the tandem, the billing system at the end office cannot determine whether the call will be transported over direct or common facilities from the tandem to the serving wire center. [118] Southwestern further explains that it decided that tandem switched transport could be ordered with either a single rating option (tandem or direct), but not with both options simultaneously because the methods currently employed to categorize minutes for billing would not recognize which minutes were to be billed from the serving wire center to end office and which minutes were to be billed from the access tandem to the end office. In situations (approximately 50% of the time) where SS7 is deployed on the common trunk groups between the access tandem and the end office, Southwestern could modify its CABS System to allow either direct or tandem rating to be ordered simultaneously. Southwestern indicates that it could complete an analysis of the required changes by the second quarter of 1994. [119] US West modified its proposed transport restructure tariff on November 15th, adding an option that allows customers to also order direct trunked transport from a serving wire center to an access tandem. [120]

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[115] See AT&T Petition at 27-28; MCI Petition at 11. AT&T identifies the following carriers: NYNEX, Pacific, Ameritech, Southwestern, BellSouth and Nevada.

[116] AT&T Petition at 27, n.39. In addition, AT&T states, Southwestern and Ameritech do not permit use of direct trunked transport between a serving wire center and an end office where that end office also serves as an access tandem. Id. at n.39.

[117] See e.g., Pacific/Nevada Reply at 12; SWBT Reply at 37-38; NYNEX Reply, Exh. 13 at 7; Ameritech Reply at 19. Compare, GTE Reply at 24 (GTE's tariff already provides for these options; IXCs may order a combination of tandem switched services between the SWC and the end office and direct trunked facilities directly to an access tandem with tandem switched transport to the same subtending end offices).

[118] Pacific Reply at 12.

[119] Southwestern Reply at 37-38; accord Ameritech Reply at 19.

[120] US West Reply at 21; US West November 15, 1993 D&J at 1-1 to 1-3.

59. Discussion. The First Reconsideration Order, adopted in July, 1993, required the LECs to offer both direct trunked transport between the serving wire center and an access tandem and tandem switched transport between the serving wire center and the end office via the access tandem. [121] Thus, the LECs were first required to offer these additional services to their customers less than two months prior to the September 1, 1993 filing date of the transport restructure tariffs. It appears that their failure to offer these options simultaneously to their customers is mainly a short term billing system problem. In view of the brief period of time given to the LECs to make billing system changes between the adoption of the First Reconsideration Order and the filing of the transport restructure tariffs, we find that good cause exists to grant the LECs a waiver of this requirement to give LECs time to modify their billing systems for a six-month period following the effective date of the tariffs. We have reviewed the transmittals and pleadings and conclude that no compelling argument has been presented that there are errors with respect to trunking options to justify rejection or suspension.

b. Resale, Split Billing and Shared Use

60. Petitions. Several petitioners seek tariff provisions that would allow "split billing" of a particular facility, so that an access customer can resell capacity. [122] Split billing would permit multiple customers of record for DS3 or DS1 interoffice or entrance facilities, whereas the LECs are requiring a single customer of record to be designated for these facilities. CompTel states that split billing would remove the need for a single customer of record to have to make "percentage of interstate use" or "PIU" estimates for other IXCs using the facility, and it would permit multiple IXCs to share a facility without forcing one IXC to bear financial responsibility for all others. CompTel argues that the Commission should go beyond merely prohibiting resale restrictions, and require the LECs to take certain affirmative steps to make resale and sharing feasible. In addition to split billing, these measures are: (1) require the LECs to permits switched and special access facilities to be combined (i.e., hubbed) at the IXC point of presence (POP), LEC serving wire centers, or any other designated hubbing locations; and (2) require the LECs to offer "split billing" for multiplexing equipment located at a hub, and to permit the IXC to specify (i) the type and grade of switched service as well as the code at the terminating hub; and (ii) the customer premises location associated with special access channels. [123]

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[121] See First Reconsideration Order, ¶¶ 4-9.

[122] See, e.g., MCI Petition, App. A at 17; CGI Petition at 15; CompTel Petition at 33-3; Sprint Petition at 32-33.

[123] CompTel Petition at 36. In a related request, WilTel supplemented its petition to seek relief from PIU reporting requirements in shared use situations. WilTel agrees with CompTel that IXCs who re-sell capacity over their high capacity entrance facilities to other carriers should not be held responsible by the LECs for PIU reports from their carrier customers. WilTel argues that the usage data may be competitively sensitive and that it has no way of verifying its customers' PIU reports. WilTel complains that under LEC tariffs, WilTel would bear ultimate responsibility if its reported PIU is audited by the LECs. WilTel cites, for example, the tariffs of Ameritech, Bell Atlantic, BellSouth, NYNEX, and Pacific. See Ex Parte Letter to Greg Vogt, Chief, Tariff Division from Karis A. Hastings, Counsel for WilTel, dated December 10, 1993.

61. Another aspect of the need for split billing is raised by AT&T with respect to anticipated Feature Group A (FG A) billing changes. AT&T complains that various LECs have indicated that they plan to change the current billing arrangements for FG A service. AT&T explains that currently, LECs charge the billing customer of record for FG A service. Thus, an end user may order FG A service directly from a LEC, and request a LEC to connect the end user's location with an IXC's POP for interexchange service. The FG A service is provided over LEC facilities and billed to the end user as the billing customer of record. In some cases, the LEC may request that the FG A service be provided by means of IXC-leased access facilities, in which case the LEC credits the IXC for its leased access facilities. In either case, the LEC bills the end user as the billing customer of record for the FG A service. Or, an end user may request that an IXC coordinate the ordering of facilities from the LEC for its interexchange service, in which case the IXC acts as the customer's agent. Again, the end user is the billing customer of record, and the LEC bills that end user for the FG A service ordered on its behalf. According to AT&T, on reconsideration the LECs, when seeking clarification as to the application of the interim transport rate structure to the rates for FG A service, never suggested that they would change their billing arrangements to bill the IXC rather than the customer of record for FG A services. [124]

62. AT&T asserts that nonetheless, various LECs propose to bill the IXC at whose POP the entrance facility terminates rather than the customer of record for FG A service. AT&T identifies only Ameritech, but asserts that other LECs have indicated that this is how they intend to apply their tariffs as well. AT&T argues that such a change is neither required by the Transport Orders, nor otherwise justified. AT&T requests that the Commission "clarify" that is Transport Orders do not permit any changes to the customer of record. [125]

63. In its November 15th revisions, Southwestern proposes an "Interim Split Billing Option." [126] AT&T argues that these tariff provisions should be suspended and investigated. AT&T claims that Southwestern's proposal is defective in two critical aspects: (1) Southwestern intends to hold the "primary customer" responsible for payment of the tariffed rates by all other customers sharing the facility and (2) the proposal does not address how Southwestern will bill the end user for those FG A services that are provided over LEC-controlled facilities, which AT&T argues is contrary to longstanding Commission policy. AT&T argues that holding the IXC liable for payment in this circumstance is inappropriate because the IXC is not the customer of FG A service. [127] Similarly, CompTel, although it generally applauds Southwestern for moving forward with its proposal, complains that Southwestern's policy would force the "primary customer" to stand behind settlement agreements between Southwestern and individual "secondary customers" for past-due accounts even if the "primary customer" did not consent to the settlement. CompTel complains that

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[124] AT&T Petition at 36-38.

[125] In its petition, AT&T states that NYNEX, BellSouth, SNET, and CBT have indicated that they intend to make changes with respect to FG A billing. See AT&T Petition at 35-36 n. 51; 38.

[126] See Southwestern November 15th D&J at 2-1 to 2-8.

[127] AT&T 11/30 Petition at 4-6, citing Special Permission No. 84-254, May 30, 1984 (denying AT&T's Application No. 61, May 15, 1984 and stating that "questions of applicability of FG A rates should be resolved under the appropriate exchange carrier tariffs, where the respective regulations and rates appear, rather than in an AT&T tariff").

Southwestern has provided no technical justification for this requirement and asserts that Southwestern should continue to bill multiple IXCs as separate accounts, as it does now. CompTel adds that if one IXC is forced to bear the risk of non-payment by other IXCs sharing the same facility, the split billing option will be available more in theory than in reality. [128]

64. CompTel also takes issue with NYNEX's "Shared Billing Arrangement" on the ground that it is not a meaningful form of split billing. CompTel avers that NYNEX's proposal is narrowly limited to situations where higher capacity switched access service is multiplexed onto a lower capacity service (or when a special access service is provided over DS1 or DS3 facilities). CompTel argues that the arrangement does not permit split billing of the higher-capacity service and, therefore, does not satisfy the needs of IXC customers for a meaningful split billing offering. [129]

65. Replies. LEC responses varied. Pacific, for example, asserts that it does not currently split bill MOUs on common facilities, and that the restructured transport rules make this impossible. Pacific maintains that with flat rated charges, it lacks the ability to determine which carriers are using a particular facility. Pacific states that its tariffs do not prevent a carrier from sharing facilities, however, it is the carrier's responsibility, not Pacific's, to bill and collect charges from a resold service. [130] NYNEX also claims that shared billing between the customers' premises and a hub is not possible at present. NYNEX states, nonetheless, that it understands the need for split billing, and that it plans to file a Switched Access Shared Billing Arrangement similar to its Special Access Shared Billing Arrangement option, which will allow for the billing of multiplexed DS1 or DS3 facilities to be split from the multiplexer between two or more customers. It will also review the offering of such arrangement between the IXC POP and a hub in the future. [131] NYNEX argues that changes in billing programming, ordering and provisioning methods and procedures to offer the type of split billing arrangements CompTel desires would take several additional months to implement. NYNEX therefore argues that the Commission should not require additional split billing arrangements at this time. [132]

66. BellSouth argues that its arrangements for switched transport merely track the existing BellSouth tariff arrangements for special access, and that it is the customer who

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[128] CompTel 11/30 Comments at 6-7.

[129] CompTel 11/30 Comments at 7 n.2, citing NYNEX Tariff F.C.C. No. 1, Section 6.7.14; NYNEX D&J at Section II.

[130] Pacific Reply at 9-10; accord GTE Reply at 27-28; BellSouth Reply at 53 (no further accommodations should be required).

[131] NYNEX Reply, Exh. 13 at 1.

[132] NYNEX 12/8 Reply to CompTel's 11/30 Comments at 4. United and Central oppose consideration of WilTel's supplement requesting that LECs institute a split billing option where, because WilTel lacks verifiable PIU data for its customers, the LEC bills WilTel customer on the ground that the LECs also lack verifiable PIU information from WilTel's customers because it is WilTel, not the LECs, who is in privity with them and therefore is in a better position to require audit reports of its customers than the LECs. See Ex Parte Letter to William F. Caton, Acting Secretary, FCC from Jay C. Keithley, Attorney for the United and Central Telephone Companies, dated December 20, 1993.

ordered that interface and the associated facility that should be billed for the interface at the customer premises at a higher capacity facility. [133] BellSouth indicates that if the customers do not like this proposal, then the FG A customer can rearrange its services and order a voice grade entrance facility. It would then be the responsibility of the FG A customer and the IXC to assure that the IXC's POP was ready and able to accept the analog interface involved. [134]

67. Southwestern acknowledges the need for split billing, but disagrees with the petitioners claiming that Southwestern in the past has provided split billing in the manner they request. Southwestern states that all pre-restructure switched access services are billed on a per MOU basis, and these MOU are billed to a single customer, based on, for example, a Carrier Identification Code (CIC). Although under the transport restructure MOU billing will continue for the usage-based elements, flat-rated monthly charges are to be assessed to the customers who requested the installation of direct trunked transport. Southwestern observes that this is a direct result of the restructure, and argues that the Commission appears to have anticipated this occurrence when it defined entrance facilities and direct trunked transport as being dedicated to a single customer. [135] Nonetheless, Southwestern states, since August, 1993, it has become apparent that some customers desired a split billing option for entrance facilities and direct trunked transport, and Southwestern then began to consider the possibility of creating such an optional billing arrangement. However, because the IXC, not Southwestern, orders the facility and controls circuit facility assignments, facilities sharing has in the past been transparent to Southwestern's billing process, which lacks readily identifiable data from which to compute a bill. Southwestern argues further that even if it were able to identify these sharing arrangements, individual customer guidance is required to know when (and when not) to employ a split billing option. As to AT&T's concern with the accommodation of end user customers (e.g., FG A foreign exchange or "FX" customers), Southwestern states a major customer education process will be necessary because such customers are likely to see the imposition of flat-rate entrance facilities and direct trunked transport charges as duplicate billing by Southwestern for services for which they assume they have already paid either Southwestern or their FG A IXC. Finally, Southwestern argues that cost considerations regarding the split billing of entrance facilities and direct trunked transport also need to be addressed because the cost of billing, for example, a DS3 facility to potentially 672 different feature group customers is greater than the cost of billing to a single customer. [136]

68. Despite the foregoing problems, Southwestern has developed its split billing option as a temporary offering, but warns that its split billing option cannot work unless Southwestern and its facility customers cooperate to identify customers and adjustments on an ongoing basis. Southwestern states that it expects to be able to implement a permanent solution by October 5, 1994, which would, inter alia, incorporate the ordering and billing changes that Southwestern is unable to develop and implement now. [137]

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[133] BellSouth Reply at 55-57.

[134] BellSouth Reply at 56; accord Ameritech Reply at 20.

[135] Southwestern Reply at 24, citing Transport Order, ¶¶ 21, 22.

[136] Southwestern Reply 22-29.

[137] See Southwestern 11/15 D&J at 2-1 to 2-2.

69. In response to CompTel and AT&T's objections to its split billing proposal, Southwestern maintains that its requirement that the primary customer remain responsible for the service that it orders is not a flaw in Southwestern's offering but a legitimate business decision to ensure that resellers accept the risks associated with their business decisions. Contrary to AT&T's representation, Southwestern argues, not all customers choosing to purchase resold services are end users, and not all switched access services being resold are FG A. Southwestern claims that implementation of AT&T's suggestion would require Southwestern to redefine the term "customer" as it relates to access services. Southwestern asserts that CompTel and AT&T fail to acknowledge in their comments that they, not Southwestern, determine to whom and under what circumstances they will resell the services they lease from Southwestern, and that it is the primary customer, not Southwestern, who has control over circuit assignment and thus determines to whom circuits will be resold. Accordingly, Southwestern maintains, it should not be required to assume the risks imposed by the decisions of other companies. For this reason, Southwestern defends its split billing option against CompTel's objection to the requirement that the primary customer stand behind settlement agreements between Southwestern and secondary customers. Finally, Southwestern argues that under the restructure, entrance facilities and direct trunked transport are under the control of the IXC customer that orders them and Southwestern should not bear the risk associated with the provision of these services if the customers to whom AT&T has made space available do not pay. [138]

70. SNET explains that FG A is a line side connection into a Class 5 switch and therefore, requires a voice grade capacity for direct-trunked transport. Because AT&T requests a DS1 interface at its POP for all of its FG A line, SNET proposes to convert these FG A lines to a shared network arrangement. Under this arrangement, SNET will bill AT&T for its interface DS1 entrance facility and a DS1 voice grade multiplexer. SNET will bill the FG A end users for voice grade direct-trunked transport to the dial tone office. [139] Similarly, NYNEX states that it plans to bill the customer of record for FG A except where multiple FG A end user customers combine at a hub or serving wire center onto a DS1 or DS3 facility. Under its proposed "Shared Billing Arrangement," NYNEX will split the bill from the hub to the end user location; however, from the hub to the POP it will bill the POP carrier. If this is not acceptable, NYNEX will probably have to convert the DS1 or DS3 to voice grade circuits for hand-off at the POP, although NYNEX acknowledges that this will probably not be acceptable to the IXC either. [140]

71. Discussion. As we indicated above, resale and sharing are important means by which IXCs and end users can make more efficient use of the LEC networks and obtain cost-effective service for their own requirements. Split billing options such as those proposed by Southwestern and NYNEX are clearly crucial if customers are to obtain maximum benefits from the restructured rates, although the LECs are correct that the Transport Orders prohibit restrictions on resale and sharing, but do not specify the means by which the LECs are to make such arrangements feasible. [141]

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[138] Southwestern 12/8 Reply at 4-6.

[139] SNET Reply at 10.

[140] NYNEX Reply, Exh. 13 at 2.

[141] See First Reconsideration Order, ¶ 62.

72. We believe that it is in the public interest for all LECs to follow the examples of NYNEX and Southwestern in their efforts to accommodate customers who desire split billing services so that they may make the most efficient and cost-effective service arrangements. However, the precise way in which such services could be provided is not known. Some IXCs believe there are problems with the way NYNEX and Southwestern have structured their split billing services. We do not have sufficient information to impose a structure at this time. Therefore, we direct the LECs to refer the problems described herein with respect to (1) split Feature Group A billing and (2) PIU reporting requirements in split billing arrangements to the industry's Ordering and Billing Forum for resolution and to report back to us within three months on their progress in resolving these issues. If substantial progress is not forthcoming the Commission may then consider prescribing a method for providing split billing. CompTel's request that additional affirmative sharing and resale obligations be imposed, however, cannot be addressed in the context of the tariff review process. We have reviewed the transmittals and all associated pleadings and conclude that no question has been presented with respect to tariff billing provisions that warrants rejection or investigation at this time.

c. PDR Reporting Requirements

73. Petitions. CompTel, MCI and Allnet object to the requirements of certain LECs that an access customer must report the percentage of traffic that is carried on direct trunked transport facilities and that passes through the tandems (so-called "Percentage Direct Routing" or "PDR" reports). [142] Allnet argues that this reporting requirement is completely unnecessary, as demonstrated by its absence from the tariffs of Pacific Bell, NYNEX and BellSouth. Allnet further argues that the offending carriers' Descriptions and Justifications provide no meaningful reasons for this reporting requirement, and that all of the LECs are fully capable of deriving this information themselves because both the tandems and the end offices have measurement capabilities. [143] Allnet proposes that if any LEC cannot determine the amount of traffic actually routed through a tandem rather than that routed over direct trunks, that LEC should use a "default" PDR factor calculated based on the number of direct trunks in place, with the assumed MOU of 9,000 per trunk. [144]

74. CompTel notes that Ameritech, Bell Atlantic, Southwestern and US West have stated that non-reporting customers will be presumed to have 100% tandem switched traffic. It also notes that there is little consistency among the LECs as to what feature groups should be subject to PDR reports, and a lack of clarity as to when the LECs will rely on the reports as opposed using to actual measurement. CompTel argues that the Commission should reject all PDR reporting requirements until the LECs have established (1) why they need PDR reports, and (2) when such reports will apply. CompTel argues further that because the PDR reports effectively allocate an IXC's traffic between tandem switched transport and direct trunked transport facilities, they could have an direct and material effect upon the rates paid by IXCs under the tariffs, and should therefore be rejected as violating 47 C.F.R. Sections 61.2 & 61.54(j) and 47 U.S.C. Section 201(b). [145]

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[142] See CompTel Petition at 37-39; Allnet Petition, App. 2 at i-iii; MCI Petition, App. A at 14.

[143] Allnet Petition, App. 2 at i.

[144] Allnet Petition, App. 2 at ii-iii.

[145] CompTel Petition at 36-38.

75. Replies. US West replies that it would not disagree with petitioners' comments under normal circumstances. However, US West states that in the context of the transport restructure, it has required IXCs to report a PDR factor as a default mechanism to cover those situations where the billing system is unable to bill accurately based on tandem and direct routing detail. If an IXC fails to report a PDR, and US West is unable to measure tandem-routed traffic, it will assign a 50 percent PDR by default. US West claims that the PDR data should ensure that IXCs are treated fairly if billing problems arise. [146] Southwestern argues that the fact that other carriers have not required PDR reports does not demonstrate that Southwestern has alternatives available to it. Southwestern lacks measurement capabilities only with respect to FG B. Accordingly, Southwestern uses the PDR factor for all originating FG B. Southwestern argues that Allnet's proposal is arbitrary and should be rejected. [147] Ameritech states that it only requires PDR for FG C and originating FG B service when the customer has both direct and tandem routed facilities, because in such cases, Ameritech lacks measurement capabilities, and adds that very few customers will be affected by this requirement. [148] Bell Atlantic indicates that it can measure these minutes and will remove the PDR requirement in its revised filing. [149]

76. Discussion. We view PDR reporting requirements as an interim measure undertaken by the LECs in face of the extensive usage measurement and billing system changes necessitated by the transport restructure. We agree with Allnet that PDR reporting should only be permitted where measurement capabilities are not available, and that the default calculation where IXCs do not submit PDR reports should be based on the number of direct trunks in place, calculated based on an assumed MOU of 9,000 MOU per trunk. Accordingly, we will permit LECs, in conjunction with the transport restructure, to require PDR reports from IXCs if the LECs lack adequate measurement capabilities to determine the percentage of direct routed and tandem routed traffic for particular feature groups, and to institute reasonable default provisions in the absence of customer-provided PDR data. Such carriers will be permitted to require PDR reports for a six month period following the effective date of the interim transport tariffs while they introduce the appropriate billing system modifications needed to measure actual tandem-routed traffic. The end date for PDR reporting requirements is to be included in the tariffs. The LECs have made tariff revisions to reflect this in their December 23rd filings. We have reviewed the pleadings, transmittals and the foregoing clarifications and revisions and conclude that no question as to service limitations or reporting requirements has been presented that requires rejection or suspension.

D. Carrier-Specific Issues

1. Ameritech: "Virtual Direct-Trunked Transport Option"

77. Petitions. CompTel observes that Ameritech has proposed a new direct trunked option known as the "Virtual Direct-Trunked Transport Option." As defined in Section

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[146] US West Reply at 32-33.

[147] Southwestern Reply at 40-42.

[148] Ameritech Reply at 20-21.

[149] Bell Atlantic Reply at 9 n.29. Bell Atlantic's November 15th filing removed its PDR reporting requirement.

6.1.3(A)(1)(b)(2) of Ameritech's tariff, this option applies only to DS1 interoffice transport and requires the customer to surrender its right to specify circuit channel assignments or to route special access over the circuits. CompTel believes that as a service option, virtual direct trunked transport appears identical to the Bulk Capacity Transport option for which Ameritech previously filed a "Petition for Waiver" on April 14, 1993. The Commission placed the petition on public notice (DA 93-465) on April 21, 1993. CompTel argues that to the extent Ameritech is relying on its waiver petition to offer virtual direct trunked transport, the offering should be rejected for the reasons stated in CompTel's earlier Opposition, filed May 11, 1993. To the extent Ameritech is not relying on that petition, its offering should be stricken from Ameritech's local transport tariff as being flatly inconsistent with the Commission's rules for direct trunked service. Moreover, CompTel argues, the option should be rejected because Ameritech might propose a lower rate for virtual direct trunked transport in the future. [150] Allnet questions the impact of the proposed tariff option on the demand figures used to develop other rates. [151]

78. Replies. In its reply, Ameritech defends its virtual direct trunked transport offering and argues that it is distinct from the bulk capacity service that was the subject of its earlier waiver petition. Nonetheless, in its December 23rd filing, Ameritech revised its tariff language with respect to direct trunked transport by removing virtual direct trunked transport as a separate service from direct trunked transport in its tariff. [152]

79. Discussion. We have reviewed the transmittals and all associated pleadings. We conclude that after Ameritech's December 23rd revision, no questions has been presented as to Ameritech's direct trunked transport offering that requires rejection or suspension.

2. US West.

Petitions.

80. Transport Rate Benchmark. CompTel observes that US West's Description and Justification (Workpaper 3, Page 1 of 1) indicates that use of US West's PCI-adjusted September, 1992 rates will not satisfy the DS3-to-DS1 benchmark ratio of 9.6 to 1. Therefore, US West adjusted its DS1 and DS3 rates to meet the 9.6 to 1 benchmark. Sprint and CompTel contest the method US West uses to comply with the Commission's benchmark requirement and argue that this is not what the Commission intended when it adopted the 9.6 to 1 benchmark. Sprint also claims that US West failed to explain the derivation of its adjusted rates adequately. [153]

81. CompTel acknowledges that US West's ability to comply with the 9.6 to 1 benchmark was constrained by the Commission's additional requirement that any revenues lost

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[150] CompTel Petition at 38-40 & n.60.

[151] Allnet Petition, App. 1 at vi-vii.

[152] Ameritech Reply at 17-18. In its December 23rd revisions, Ameritech removed all references to Virtual Direct Trunked Transport as a separate service. Ameritech will still permit the customer to request that the telephone company maintain Connecting Facility Assignment control of the customer's facilities for LT-1 Direct Transport service; however, no rate difference pertains to this option.

[153] See Sprint Petition at 27-28; CompTel Petition at 25-28.

through lower DS1 direct trunked transport rates would have to be recovered through higher DS3 direct trunked transport rates or higher tandem switched transport rates to maintain the same ratio of facilities-based revenue to interconnection charge revenue. CompTel asserts that US West achieved this by reducing its DS1 direct trunked transport rates by approximately 9.3 percent, and thereby caused a corresponding reduction in both direct trunked transport revenues (where DS1 is a direct trunked transport option) and tandem switched transport revenues (where the tandem switched transport rate is derived from a mix of DS1 and DS3 rates). The only way for US West to offset those revenue reductions, CompTel argues, was through higher DS3 rates, but because US West estimated no demand for DS3 direct trunked transport facilities for rate-making purposes, it was forced to increase its DS3 direct trunked transport rates by 46 percent in order to raise the tandem switched transport rate sufficiently to offset the revenue loss caused by the DS1 rate reductions. The end result, CompTel complains, was a massive increase in the tandem switched transport rate to fund a modest rate reduction for DS1 direct trunked transport users. [154]

82. CompTel contends that the Commission did not contemplate that tandem switched transport users would fund rate reductions for direct trunked transport users when it adopted the benchmark and accompanying revenue ratio neutrality rule; rather, it hoped to foster a trend of decreasing DS1 special access rates. CompTel urges the Commission to require US West to retain its DS3 Special Access rate for the DS3 direct trunked transport service, and then calculate a lower DS1 direct trunked transport rate so that the benchmark relationship satisfies the 9.6 to 1 standard. The tandem switched transport rate should then be calculated based upon the corrected DS1 and DS3 direct trunked transport rates. CompTel acknowledges that this relief would require waiver of the Commission's rule, 47 C.F.R. Section 69.108(c), that the ratio of facilities-based revenues to interconnection charge revenues remain constant. CompTel argues that this relief is equitable because it ensures that the impact of less discriminatory direct trunked transport rates is spread among all transport users through the interconnection charge rather than borne by tandem switched transport users alone. [155]

83. Interim billing conversion for direct trunked transport. Allnet, AT&T and WilTel make various claims with respect to US West's ability to bill properly for direct-trunked transport, as reflected in its tariff provisions. Allnet asserts that US West will engage in "fraudulent billing," [156] while WilTel claims that US West lacks sufficient knowledge about its network configuration to bill accurately for direct-trunked transport. [157] AT&T submits that US West's proposal to charge IXCs for direct-trunked DS1 facilities on an "interim" basis is inconsistent with the Transport Orders, which require that DS1 facilities for direct trunked transport be based on special access rates for DS1 facilities. AT&T interprets US West's tariff as allowing it to charge customers the higher voice grade rate if the entire DS1 facility equivalent to 24 voice grade channels is not used. [158]

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[154] CompTel Petition at 26.

[155] CompTel Petition at 27-28.

[156] Allnet Petition, App. 2 at v-vi

[157] WilTel Petition at 9.

[158] See US West D&J, Sections 1.3, 1.4. AT&T Petition at 34-35.

Replies.

84. Transport rate benchmark. US West defends its rate development as consistent with the Commission's requirements. It argues that the fact that Sprint and CompTel do not like the results does not make them unreasonable. US West states that under these rules, its a "zero sum game" in which any change in the DS1/DS3 benchmark leads to a cost shift between direct-trunked an tandem-switched transport. US West objects to CompTel's proposed "tinkering" with US West's rates to satisfy CompTel's particular needs. [159] US West states that if the Commission wants to avoid the outcome Sprint and CompTel point out, a simple solution is to allow US West to use its September 1992 special access rates. [160]

85. Interim billing conversion for direct trunked transport. US West replies that petitioners are either mistaken or are distorting the truth. US West maintains that its billing procedures will adhere to the terms of its interim local transport tariff which complies with the Transport Orders. It speculates that their confusion arises out of conversion of the existing embedded base of direct-routed facilities to the interim rate structure and the network reconciliation process. US West argues that billing under the transport restructure is not simple because it has to ensure that customers are being billed properly. Therefore, it intends to bill under its own interim network reconciliation process. When this is complete, carriers will have verified that US West's records properly reflect the classification of any given facility. AT&T, according to US West, has simply misinterpreted the tariff provisions. Customers can purchase new facilities at the DS1 rate, but for purposes of converting existing facilities the process differs because US West does not assume a cross-over point of less than 24 channels. If a customer is unhappy, it can "re-groom" by purchasing new channels at the DS1 rate. [161] Nonetheless, US West has revised its tariff to eliminate the interim billing conversion provisions in its December 23rd filing.

Discussion.

86. We have reviewed the transmittals, pleadings and underlying data and find that US West appears to have followed the benchmark requirements contained in the Transport Order and the Commission's rules. US West has revised its interim billing conversion for direct trunked transport in a manner that complies with the Transport Order and the Commission's rules. We conclude that no question has been presented that the subject tariff provisions require rejection or investigation.

IV. CONCLUSION

87. In addition to the foregoing significant issues, a number of minor issues were raised in the pleadings regarding rate development and tariff terms and conditions. Based upon our review of all of the tariff transmittals, including the clarifications and revisions filed subsequent to the original September 1, 1993 tariff filings, and all of the pleadings filed, we conclude that no questions have been presented that justify rejection or suspension of the interim local transport restructure tariffs at this time.

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[159] US West Reply at 14-17.

[160] US West Reply at 14-17.

[161] US West Reply at 34-35.

V. ORDERING PARAGRAPHS

88. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation of the tariff transmittals filed by Ad Hoc Telecommunications Users Committee; Allnet Communications Services, Inc.; American Telephone and Telegraph Company; CGI, Communigroup, Inc., Express Tel, NTS Comm. Inc., Tel America, Telephone Express, Vartec Telecom, Inc.; Communigroup, Inc., NTS Communications, Inc., and Vartec Telecom, Inc.; Competitive Telecommunications Association; Compuserve Inc.; General Communications, Inc.; Goodyear Tire and Rubber Co., Kulicke & Soffa Industries, Reliance Insurance Co., Sinclair Oil Corp., and VISA Corp.; MCI Telecommunications, Inc.; RCI Long Distance, Inc.; Sprint Communications Company LP; Teleport Denver Ltd.; and Wiltel, Inc., ARE DENIED.

89. IT IS FURTHER ORDERED that the motions to accept late filed replies filed, respectively, by US West Communications, Inc. on October 26, 1993 and Citizens Utilities Company of California on November 1, 1993 ARE GRANTED.

90. IT IS FURTHER ORDERED that the requirement that local exchange carriers offer both direct trunked and tandem switched transport between a specific serving wire center and an access tandem pursuant to Transport Rate Structure and Pricing, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370, 5371-72 (1993) IS WAIVED for a six-month period following the effective date of the tariffs.

91. IT IS FURTHER ORDERED that local exchange carriers that currently lack adequate measurement capabilities to determine the percentage of direct and tandem routed traffic for particular feature groups ARE PERMITTED to include "Percent Direct Routed" reporting requirements and reasonable default provisions in the absence of customer-provided data in their interim transport restructure tariffs for a six-month period following the effective date of the tariffs.

92. IT IS FURTHER ORDERED that any local exchange carrier that chooses to defer the effective date of the instant tariff filings to January 1, 1994, may do so by filing a supplement to its tariff. For this purpose, Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58 and 61.59, ARE WAIVED, and Special Permission Number 93-1255 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

APPENDIX A

Transport Tariff Filings

Company	Transmittal No.	Tariff F.C.C. No.
Alltel Service Corporation **(Alltel)**	13	1
Ameritech Services **(Ameritech)**	736	2
Anchorage Telephone Utility **(Anchorage)**	68	5
Atlantic Telephone Membership Corporation **(Atlantic Telephone)**	2	1
Bay Springs Telephone Company **(Bay Springs)**	61	1
Bell Atlantic **(Bell Atlantic)**	594	1
BellSouth Telecommunications, Inc. **(BellSouth)**	141	1
Bloomingdale Home Telephone Company **(Bloomingdale Home)**	2	1
Central Telephone Companies **(Central)**	231	1
Century Telephone of Ohio, Inc. **(Century of Ohio)**	11	1
Chillicothe Telephone Company **(Chillicothe)**	44	1
Cincinnati Bell Telephone **(CBT)**	634	35
Citizens Utilities Company of California **(Citizens)**	12	1
City of Brookings **(City of Brookings)**	3	1
Coastal Utilities, Inc. **(Coastal)**	11	1
Farmers Telephone Cooperative, Inc. **(Farmers Coop.)**	8	1

Company	Transmittal No.	Tariff F.C.C. No.
Fidelity Telephone Company Bourbeuse Telephone Company **(Fidelity/Bourbeuse)**	39	1
GTE Telephone Operations **(GSTC)**	55	1
GTE Telephone Operations **(GTOC)**	821	1
Granite State Telephone, Inc. **(Granite)**	10	1
GVNW Inc./Management **(GVNW)**	84	1
Hargray Telephone Company **(Hargray)**	13	1
Horry Telephone Cooperative, Inc. **(Horry)**	2	1
Millington Telephone Company, Inc. **(Millington)**	9	1
Mount Horeb Telephone Company **(Mt. Horeb)**	10	1
Illinois Consolidated Telephone Company **(Illinois)**	73	2
John Staurulakis, Inc. **(J. Staurulakis)**	2	1
Lincoln Telephone & Telegraph Company **(Lincoln)**	75	2
Lufkin-Conroe Telephone Exchange, Inc. **(Lufkin-Conroe)**	15	2
Merchants & Farmers Telephone Company **(Merchants)**	2	1
Merrimack County Telephone Company **(Merrimack)**	11	1
National Exchange Carrier Association **(NECA)**	566	5

Company	Transmittal No.	Tariff F.C.C. No.
Nevada Bell **(Nevada)**	172	1
Northwestern Indiana Telephone Company **(Northwestern Indiana)**	5	1
Northwestern Iowa Telephone Company **(Northwestern Iowa)**	2	1
NYNEX Government Affairs Co. **(NYNEX)**	221	1
Odin Telephone Exchange, Inc. **(Odin)**	2	1
Pacific Bell **(Pacific)**	1647	128
Rochester Telephone Corporation **(Rochester)**	205	1
Roseville Telephone Company **(Roseville)**	32	1
Southeast Telephone of Wisconsin **(Southeast Wisc.)**	14	1
Southern New England Telephone **(SNET)**	574	39
Southwestern Bell Telephone **(Southwestern Bell)**	2295	73
Sugar Land Telephone **(Sugar Land)**	19	1
Taconic Telephone Corporation **(Taconic)**	20	1
Telephone Utilities Exchange Carrier Assoc. **(TUECA)**	123	1
United Telephone Association, Inc. **(United Tel. Assoc.)**	6	1
United Telephone System **(United)**	330	5

Company	Transmittal No.	Tariff F.C.C. No.
U S West, Inc. **(US West)**	396	1
Virgin Islands Telephone Corporation **(Vitelco)**	19	1
Vista Telephone Company **(Vista Tel)**	22	1
Vista-United Telecommunications **(Vista-United)**	12	1
Walnut Hill Telephone Company **(Walnut Hill)**	56	1

APPENDIX B

Petitions Against Tariffs

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communications Services, Inc. (Allnet)

American Telephone and Telegraph Company (AT&T) *

CGI, Communigroup, Inc., Express Tel, NTS Comm. Inc., Tel America, Telephone Express, Vartec Telecom, Inc. (filing one petition) (CGI)

Communigroup, Inc., NTS Communications, Inc., and Vartec Telecom, Inc. (filing one petition) (Communigroup)

Competitive Telecommunications Association (CompTel) *

Compuserve Inc. (Compuserve)

General Communications, Inc. (GCI)

Goodyear Tire and Rubber Co., Kulicke & Soffa Industries, Reliance Insurance Co., Sinclair Oil Corp., and VISA Corp. (filing one petition) (Goodyear)

MCI Telecommunications, Inc. (MCI)

RCI Long Distance, Inc. (RCI)

Sprint Communications Company LP (Sprint)

Teleport Denver Ltd. (TDL)

Wiltel, Inc. (WilTel)

* Denotes petitioners filing against 9/1/93 and 11/15/93 Transmittals

APPENDIX C

List of Replies To Petitions

Alltel

Ameritech

Anchorage

Atlantic Telephone

Bell Atlantic

BellSouth

Central

Century Telephone of Ohio

Chillicothe

CBT

Citizens

Granite State

GTE (GSTC & GTOC)

GVNW

Lincoln

Lufkin-Conroe

Merrimack County

NECA

NYNEX *

Pacific and Nevada

Rochester

Roseville

SNET

Southwestern *

United

TDL

US West

Warwick Valley Telephone Co. (J. Staurulakis)

* Denotes LECs filing replies to 10/25/93 and 11/30/93 petitions or comments

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-532
Washington, D.C.

In the Matter of	)	
	)	
Open Network Architecture Tariffs	)	CC Docket No. 92-91
of Bell Operating Companies	)	

ORDER

Adopted: December 2, 1993; Released: December 15, 1993

By the Commission: Chairman Hundt not participating.

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Attachment A - List of Commenters
Attachment B - Estimated Effect of Commission Economic Determination on BSE Rates and Variance
Attachment C - Evaluation of Direct Costs and Overheads

I. INTRODUCTION

1. This Final Order completes the investigation of Open Network Architecture (ONA) rates that took effect pursuant to the Commission's decision in the Part 69 ONA Order.[1] In that Order, the Commission adopted revisions to Part 69 of the Commission's Rules, specifying rate structure and other tariffing requirements for BOCs when implementing Open Network Architecture (ONA), including the filing of tariffs for ONA services. The Commission ordered the BOCs to unbundle from their existing feature group access arrangements optional service offerings, to be called basic service elements (BSEs). These BSEs were distinguished from the essential, underlying switching and transmission services called basic serving arrangements (BSAs). This structure, and related safeguards adopted in the Part 69 ONA Order, will enable BOCs to compete in the enhanced services market and encourage efficient prices and innovation, while preventing anticompetitive practices they might direct at independent enhanced service providers. Unbundled and optional BSEs are initially priced on a flexible cost-based standard reflecting Commission concern over BSE rate levels, while permitting flexibility to promote efficient pricing and the development of innovative new services. The essential BSA component is priced "residually" -- set at a level that maintains overall revenue neutrality for the repriced BSA and BSE services within the local switching category compared to pre-ONA feature group arrangements.

[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (Part 69 ONA Order), modified on recon. 7 FCC Rcd 5235 (1992) other petitions for recon. pending. The BOCs' ONA plans had been previously approved. See Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (ONA Amended Plans Order).

2. The Common Carrier Bureau (Bureau) suspended for one day the ONA tariffs of the Ameritech Operating Companies (Ameritech), imposed an accounting order, and initiated an investigation to determine whether these rates are just and reasonable. [2] This investigation was later expanded to include the ONA tariffs of other Bell Operating Companies (BOCs). [3] On April 16, 1992, in the ONA Designation Order, the Bureau designated ten issues in the ONA investigation, and directed one or more of the BOCs to respond to each issue. [4] Eight parties filed oppositions to the direct cases, and each BOC filed a reply. [5] The Bureau also required the BOCs to submit cost support materials to review by an independent auditor which reported its findings to the Commission and intervening parties. A key element of BSE cost support in this investigation consists of computer models that are intended to provide a measure of the unit cost of providing BSEs resident in BOC switches and software. Six of the regions employed the Switching Cost Investment System (SCIS) software provided under license by Bellcore to develop unit investments used to justify rates for BSEs; US West used SCIS as well as a second model developed in-house, the Switching Cost Model (SCM). [6]

3. Based on our examination of the ONA tariffs, the BOCs' direct cases, the oppositions and replies associated with those direct cases, and other information described in more detail below, we conclude that many BSE rates have been developed using specific costing methodologies that were in whole or part unreasonable, therefore resulting in rates that are unjust and unreasonable. At the same time, the methods employed by BOCs are generally sound apart from these specific deficiencies. Accordingly, we order the BOCs to revise their rates to reflect reasonable costing methodologies as set forth below, or provide a justification for using some other costing methodology. In addition, we are prescribing one element of BSE ratemaking methodology: BOCs must base their BSEs on prospective technology mixes. This is discussed in more detail below. Most of our recommended revisions tend to moderate the extent of BSE rate variation among BOCs, and tend to reduce BSE rates, while a few tend to increase BSE rates slightly. Overall, the variation in BSE rates of different carriers has been

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[2] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, Memorandum Opinion and Order, 7 FCC Rcd 257 (Com.Car.Bur. 1991) (Ameritech ONA Tariff Order), modified by Ameritech Operating Companies, 7 FCC Rcd 948 (Com.Car.Bur. 1992) (correcting the ordering clause establishing an accounting order).

[3] Bell Atlantic Telephone Companies, et al., Open Network Architecture Tariffs, 7 FCC Rcd 1512 (Com.Car.Bur. 1992) (ONA Investigation Order); Ameritech Operating Companies, et al. 7 FCC Rcd 1936 (Com.Car.Bur. 1992); Nevada Bell, CC Docket No. 92-91, 7 FCC Rcd 4051 (Com.Car.Bur. 1992) (Nevada Bell Order). In all these Orders, the Bureau suspended the tariffs before it for one day, and subjected those rates to accounting orders. The Bell Operating Companies are the Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[4] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 7 FCC Rcd 2604 (Com.Car.Bur. 1992)(ONA Designation Order).

[5] A list of parties filing pleadings, and the names by which we refer to them in this order, is included as Attachment A.

[6] In this Order, for simplicity in expression, we use the acronym SCIS in our general discussions that include both the SCIS and SCM cost models. US West developed rates using a combination of both models which results in unlawful rates (*See* paras. 57 ff). Therefore, specific remedial steps directed toward curing SCIS-based rates are not necessarily applicable to curing SCM-based rates. US West in its subsequent 1993 annual access filing based ONA rates on a later version of SCM not reviewed in this investigation. The adequacy of the later-developed SCM model will be considered in the pending investigation of annual 1993 access filings. 1993 Annual Access Tariff Filings, CC Docket No. 93-193, 8 FCC Rcd 4960, *erratum*, 8 FCC Rcd 5119 (1993).

reduced significantly. [7] Under our revisions to the BOCs' costing methodologies, the BOCs retain substantial pricing flexibility consistent with our policy of encouraging efficient pricing and innovation. [8] With respect to US West only, we conclude that US West has filed BSE rates so unsupported that, based on the record before us, its fundamental investment method must be found unreasonable. US West is required to file replacement, cost-supported ONA rates on the schedule established for other BOCs' corrective filings.

II. BACKGROUND

A. General

4. In the Computer III proceeding, [9] the Commission initiated a process for replacing the structural separation requirements for BOCs' enhanced service operations with nonstructural safeguards, including ONA. ONA was designed to unbundle certain services provided by BOCs, both to promote efficient and innovative use of the network by independent enhanced service providers (ESPs) and to prevent discrimination by BOCs in their offerings of BSEs to competing ESPs and BOC-owned ESPs. The Commission concluded that the provision of unbundled basic service "building blocks" would promote the ability of the BOCs' ESP competitors to compete effectively. Hence, the Commission ordered the BOCs to unbundle from their existing feature group access arrangements optional features called BSEs. The BOCs described this unbundling in detail in their ONA Plans, which were approved by the Commission in 1990. [10]

5. For purposes of tariff review, unbundled ONA service elements are considered as new services rather than restructured offerings, and so must satisfy the costing standard for new services established in the Part 69 ONA Order and subsequent ONA Reconsideration. The Part 69 ONA Order adopted a flexible, cost-based approach to pricing these ONA services that requires BOCs to base rates for BSEs on direct costs plus reasonable, uniform overheads. Specifically, this flexible cost-based approach permits carriers to adopt their own methodologies for developing direct costs and overhead costs, allows deviations from these uniform overhead loading methodologies if adequately justified, and gives BOCs an opportunity to earn a "risk premium" to encourage particularly risky new services. [11]

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[7] A chart specifying the effects of our requirements is included as Attachment B.

[8] See Part 69 ONA Order, 6 FCC Rcd at 4531, para. 38.

[9] Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986); recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Amendments of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 2 FCC Rcd 3072 (1988) (Phase II Order), recon., 3 FCC Rcd 1150 (Phase II Reconsideration), vacated sub nom. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), appeal pending sub nom. Illinois Bell Tel. v. FCC, No. 881364 (D.C. Cir. pet. for rev. filed May 16, 1988). See also Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991).

[10] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990) (ONA Amended Plans Order).

[11] Part 69 ONA Order, 6 FCC Rcd at 4531, paras. 42-44. In addition, in the ONA Reconsideration, we relaxed our new service requirements in cases in which a BOC is offering a new service sufficiently similar to an existing service that the BOC expects customer migration between services. In those cases, the BOC is allowed to establish any new service price less than or equal to the price of the existing service. ONA Reconsideration Order, 7 FCC Rcd at 5236-37, paras. 8-11.

6. In the wake of the Part 69 ONA Order in 1991, the BOCs tariffed several dozen different BSEs. [12] One example of a BSE is Automatic Number Identification, which identifies the billing number of the calling party. Other examples of separately useful BSEs include services used by burglar alarm companies, such as the Derived Channels (Monitoring) BSE, [13] and Uniform Call Distribution (UCD), which avoids over-burdening individual stations in large-scale operations such as reservation systems by distributing calls uniformly among incoming telephone lines.

7. To develop initial BSE rates, BOCs first enter switch usage data from traffic studies and capital costs from plant records into computer models. These computer models also contain detailed price and performance specifications from switch manufacturers about their switches. The SCIS/SCM models are used to generate unit investment for specific switch types, for each BSE. As an early step in this process, SCIS develops a "model office," which is an average of all the existing switches of a certain type in the BOC's network. [14] SCIS employs the model office to generate unit investments associated with providing each BSE over a particular switch type. Then the BOCs develop a total unit investment for each BSE by calculating a weighted average of the unit investments produced by each model office. In weighing the unit investments associated with particular switch types, the BOC either assumes the mix of switch technologies present in its network (the "embedded" approach) or a mix based on planned replacement decisions (the "prospective" technology mix). Finally, using these aggregate unit investment amounts as a base, the carriers apply direct cost factors and overhead loading factors to estimate the costs used to compute BSE rates.

B. Use of Proprietary Data to Compute Rates

8. In the ONA context, the Commission for the first time is involved in the detailed oversight of exchange carrier ratemaking processes that disaggregate local switching functions into discrete services. As explained in detail in the SCIS Disclosure Order [15] and related Freedom of Information Act decisions, review of this process inherently entails review of sophisticated computer models, as there is no other practicable method by which to reasonably and consistently recognize the use and associated investment of switch sub-components in a variety of service offerings. [16]

9. Both SCIS and SCM employ proprietary pricing and switch design information supplied by switch vendors. Bellcore and US West also hold intellectual property rights in the models. After reviewing SCIS/SCM in camera and evaluating manufacturers' assertions that they would

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[12] ONA Amended Plans Order, 5 FCC Rcd at 3122-23, App. C.

[13] NYNEX offers this BSE under a trademark name, PULSENET.

[14] By a "type" of switch, we mean a brand of switch produced by a specific manufacturer, such as AT&T's 1AESS switch or 5ESS switch, or Northern Telecom's DMS 10 or DMS 100.

[15] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (SCIS Disclosure Order). A companion Order adopted today denies MCI's application for review of the SCIS Disclosure Order. We consider below, in Section IV.B., contentions that the disclosure of these materials was inadequate for meaningful intervenor participation.

[16] It is well established that "the Administrative Procedure Act does not require that every bit of background information used by an administrative agency be published for public comment," as long as data sufficient to support the agency's actions were available to petitioners for comment. B.F. Goodrich Co. v. Dept. of Transportation, 541 F.2d 1178, 1184 (6th Cir. 1976), cert. denied, 430 U.S. 930 (1977); In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1354 n.9 (D.C. Cir. 1980). As discussed more fully below, SCIS Redaction II did not prevent meaningful review of SCIS.

suffer competitive harm from the disclosure of the model or vendors' data used to develop and maintain it, the Bureau determined in the SCIS In Camera Order that the BOCs need not make these models available on the public record under the Freedom of Information Act (FOIA) or Commission Rules. [17] Specifically, FOIA Exemption 4 provides that "trade secret and commercial or financial information obtained from a person and privileged or confidential" is not subject to mandatory disclosure. [18] However, in the subsequent SCIS Disclosure Order, the Bureau established two discretionary procedures in order to balance the interests of Bellcore and switch vendors in keeping proprietary information confidential, and of intervenors in participating effectively in the ONA investigation. Specifically, the Bureau required Bellcore and US West, in cooperation with switch vendors, to develop redacted SCIS and SCM models, which would allow intervenors to observe the models in operation, and determine their sensitivity to changes in various input data values, without disclosing the most sensitive proprietary data. These redacted SCIS and SCM models, as they were later refined, were provided to intervenors subject to nondisclosure agreements. [19] In addition, the SCIS Disclosure Order required BOCs to hire an independent auditor to review SCIS, file a report with the Commission, and provide intervenors a redacted version of this report. The BOCs hired Arthur Andersen and Co. (Andersen) for this purpose.

10. On March 4, 1992, MCI made an ex parte presentation to the Bureau staff contending that the SCIS redactions were so excessive that the model had been made useless to intervenors. Bureau staff had also identified deficiencies in the first redaction, and the BOCs subsequently developed a second redacted model. This model, hereafter referred to as "Redaction II," is discussed below. Several intervenors filed comments under protective cover based on their examination of the redacted SCIS/SCM models and Andersen Report, and the BOCs filed replies under protective cover. [20]

III. ISSUES

A. Flexible Cost-Based Rates and Rate Variation

11. Some intervenors have asserted that BSE rates that vary as much as these cannot all be reasonable. [21] Others state a more general position: that the Commission's "flexible cost-based approach" allows too much flexibility, and may lead to unreasonable or discriminatory rates. [22] The BOCs respond that the flexibility provided by SCIS and other aspects of their

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[17] Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521, 521 n.4 (Com.Car.Bur. 1991) (SCIS In Camera Order); App'n for Review denied, 8 FCC Rcd 422 (1993); Allnet Communications Services, FOIA Control No. 92-266, 7 FCC Rcd 6329 (1992) (Allnet Order), upheld Allnet Communications Services, Inc. v. FCC, 800 F.Supp. 984 (D.D.C. 1992).

[18] Freedom of Information Act, 5 U.S.C. § 552(b)(4).

[19] See Letter from James F. Britt, Bellcore, to Chief, Common Carrier Bureau (July 31, 1992).

[20] In addition to the pleadings and the Andersen Report, the Bureau by its letter of December 11, 1992, directed Andersen to respond to several queries developed by the Bureau and intervenors. Furthermore, Andersen and the BOCs were required to comply with a data request issued by the Bureau on December 14, 1992.

[21] Sprint Opposition at 2-3; GSA Opposition at 2-3; MCI Opposition at 3-4; Ad Hoc Opposition at 7-9.

[22] Sprint Opposition Appendix at 1-2; Metromedia Opposition at 7-8; Wiltel Opposition at 17-18; Ad Hoc Opposition, Appendix I, at 4-6; MCI Opposition at 34-35. See also Sprint Opposition Appendix at 3-5 (criticizing variation in BSE rates resulting in differences in the way BOCs aggregate data, and recommending use of benchmarking in review of BSE rates).

ratemaking process is consistent with the Commission's flexible cost based approach, and any further limits on their flexibility would be inconsistent with the Part 69 ONA Order. [23]

12. Dramatic rate variance alone does not establish that individual rates are unreasonable. Rather, we determine the causes of the variance and assess whether some ratemaking flaw makes some of these variant rates unreasonable. Legitimate reasons for rate variance include differences in demand patterns, population density, or network configurations. As to the BOCs' assertion that any revision to their rates would conflict with the Part 69 ONA Order, the "flexible cost-based approach" described in the Part 69 ONA Order was intended to give carriers flexibility sufficient to encourage efficiency and innovation, not complete freedom in developing rates.

> Once the direct costs have been identified, LECs will add an appropriate level of overhead costs to derive the overall price of the new service. To provide the flexibility needed to achieve efficient pricing, we are not mandating uniform loading, but BOCs will be expected to justify the loading methodology they select as well as any deviations from it.

Part 69 ONA Order, at 4531, para. 44 (emphasis supplied). The Commission's intent was to permit carriers to establish a reasonable and consistent method for their identification of direct costs, with the flexibility needed for efficient pricing to be achieved in the administrative loadings applied to the direct cost figures. Thus, limiting carriers' ratemaking discretion, as we do in this Order below, is entirely consistent with our intent in the Part 69 ONA Order. [24] None of these limitations on ratemaking flexibility noticeably reduce the incentives we established in the Part 69 ONA Order for development of innovative new services and efficient prices.

13. In considering whether carrier ratemaking discretion associated with specific designated issues has led to the development of unreasonable rates, we therefore have considered (i) the specific cost justification requirements announced in the Part 69 ONA Order and (ii) the consistency of specific BOC procedures or assumptions with general economic theory, as recognized in Commission policy. In addition, while not directly related to rate levels per se, we have considered the extent to which such exercises of discretion are exempt from public disclosure and, therefore, precluded from examination by interested parties. A recurring challenge in this proceeding has been to afford intervenors, accustomed to full disclosure of carriers' cost support materials under our Rules, a meaningful opportunity to review ratemaking processes obscured by legitimate proprietary concerns. This difficulty is inherent in the use of models, as explained previously, but to the extent that ratemaking discretion can be exercised in a more publicly accessible stage of the process without compromising carrier flexibility, we consider the exercise of discretion at inaccessible stages to be a less reasonable approach.

14. The issues surrounding the BOCs' BSE rate development process can be broken down into three groups. First, there are issues presented by the inputs chosen by BOCs to put into

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[23] PacTel Reply at 1; US West Reply at 6-7; BellSouth Reply at 3-4, 18, 25-26; Ameritech Reply at 2; NYNEX Reply at 6; PacTel Reply at 7-8; Bell Atlantic Reply at 6-7.

[24] GSA and Metromedia contend that the issues designated by the Bureau do not adequately focus discussion on the sources of variation or unreasonableness of BSE rates. GSA Opposition at 7-8; Metromedia Opposition at 3-4. According to Wiltel and Ad Hoc, the small costs associated with many BSEs, other than ANI, do not warrant the unbundling of those BSEs. Wiltel Opposition at 4, 13-15; Ad Hoc Opposition, Appendix I, at 10-11. Ad Hoc concludes that the BOCs have not justified any ONA rates, and so they should all be rejected. Ad Hoc Opposition, Appendix I, at 10-11. These petitioners raise issues which have been resolved in prior Commission Orders, or are nothing more than misplaced petitions for reconsideration of the Part 69 ONA Order or the ONA Designation Order. Thus, none of these issues warrant rate revisions.

the SCIS/SCM models. Second, the equations within the SCIS/SCM models include variables that enable the BOCs to reflect their specific networks and service areas in their BSE cost development. Third, SCIS outputs only represent the BOCs' unit investment in each type of switch for each BSE. The BOCs then develop direct costs based on switch investment, and overhead costs, to develop BSE rates. There are several issues surrounding the BOCs' development of direct cost factors and overhead loading factors. These issues are considered below.

B. SCIS Input Issues

1. Representative Model Offices

15. SCIS bases its BSE investment studies for each switch technology on a "model office." As already noted, each model office is an average of all the existing switches of a certain type in the BOC's network. Whether SCIS produces reasonable results depends in part on whether the model office is based on a representative sample of actual switches. [25] Ameritech, BellSouth, Nevada Bell, NYNEX, Pacific Bell, and Southwestern Bell state that they developed their model offices on all or practically all the switching offices from which they will provide BSE services. [26] Bell Atlantic, on the other hand, uses a statistical sampling technique for its larger study areas. Bell Atlantic bases its model office on a sample of 60 percent of the switching offices. [27] For all but two BSEs, US West used all of its switches to develop its model offices. For Make Busy Key and Message Delivery, US West used only switches in its central region (formerly Mountain Bell) in developing its model office. [28] Several intervenors assert that the data available to them is insufficient to determine whether the BOCs have skewed their sampling techniques or strategically selected switches for inclusion in the model office, and emphasize the need both for standardized sampling procedures and for current data. [29]

16. The Commission strongly prefers that BOCs base their model offices on all switching offices in their service regions. This eliminates a possible source of bias in rate development. We conclude that the model offices of Ameritech, Nevada Bell, NYNEX, Pacific Bell, and Southwestern Bell are generally representative of offices that will be used to provide BSEs. We also conclude that Bell Atlantic's sampling techniques produce model offices that are representative of offices that will be used to provide BSEs. Bell Atlantic's statistical sampling

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[25] For each switching office and remote included in the carriers' investment cost studies, the carriers were directed to provide on the record the corresponding schedule for switch replacement, and switch capacity at replacement, that are used as inputs to SCIS. None of the intervenors commented specifically on the switch exhaustion assumptions provided in the BOCs' direct cases. Based on our examination of these assumptions, they appear reasonable, and we see no reason to require revision of these assumptions. Ad Hoc recommends generally that BOCs be required to specify their switch exhaustion assumptions for a standard period three years into the future. Ad Hoc Opposition, Appendix at 6-7, 12. However, Ad Hoc has not explained why a standardized three year forecasting period would be more instructive than the switch exhaustion data actually submitted by the BOCs in their direct cases.

[26] Ameritech Direct Case at 2; BellSouth Direct Case at 24-25; Nevada Bell Direct Case at 1-2; Nevada Bell Supplemental Direct Case at 2-3; NYNEX Direct Case, Appendix A at 1; Pacific Bell Direct Case at 1-2; Southwestern Bell Direct Case at 3-4.

[27] Bell Atlantic Direct Case at 2-3.

[28] US West Direct Case at 2-3.

[29] Wiltel Opposition at 15-17; MCI Opposition at 16-19; Ad Hoc Opposition, Appendix I, at 8-9; Metromedia Opposition at 11; Sprint Opposition Appendix at 4; Ad Hoc Opposition, Appendix I, at 8-9. But see GSA Opposition at 4-5. WilTel criticizes Arthur Andersen for not discussing the averaging process used by BOCs to develop model offices. WilTel Opposition at 35-36.

technique selects switching offices in a random fashion which will not skew the resulting model office in any way. Furthermore, Bell Atlantic's sample size of 60 percent is large enough to provide statistically reliable sampling results.

17. Because SCIS does not have sufficient capacity to accommodate the large number of switching offices in BellSouth's service region, BellSouth created and employed a "user-defined study" to develop model offices. Andersen examined BellSouth's user-defined study as part of its Supplemental Report. [30] Andersen verified that SCIS cannot accommodate all the switching offices in BellSouth's region, and that the user-defined study produces results which are virtually identical to the result BellSouth would have obtained if it could include all its switching offices in the model office. [31] Based on Andersen's findings and our own review of BellSouth's user-defined study, we conclude that BellSouth's user defined study is representative of offices that will be used to provide BSEs. [32]

18. In contrast, US West provides no reasonable explanation for using only central offices in its central region to develop model offices for Make Busy Key and Message Delivery BSEs. [33] Nor has US West shown that its central region is representative of its entire service territory. The US West rates for these BSEs are therefore unreasonable because they are based on an unexplained methodology which could distort rates, and we find those rates unlawful on this ground. Specific instructions regarding US West are discussed in Section III.E. of this Order, infra.

2. Noncurrent SCIS Models and Traffic Data

19. Bellcore updates the SCIS model several times each year to reflect switch manufacturers' hardware and software upgrades. [34] The algorithms in SCIS are based in part on actual traffic data for all of the switching offices the BOCs use in a study. Staff review and the Andersen Report indicate that outdated SCIS versions and traffic data each can significantly affect SCIS investment studies. [35]

20. Allnet and AT&T contend that none of the BOCs have justified their use of either

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[30] See Letter from Chief, Tariff Division, to James F. Britt, Bellcore, December 11, 1992 (December 11 Letter).

[31] Supplemental Arthur Andersen Report at 9.

[32] Where a carrier elects to depart from the model office procedures of SCIS and utilize a "user-defined study," it must, in the ONA context, describe the SCIS limitations that require the departure and demonstrate the equivalence of its user-defined study results to SCIS operations under standard settings, as BellSouth has done in this context.

[33] See US West Direct Case at 2-3.

[34] The frequency of updates to reflect changes in switch technology is one distinguishing characteristic between SCIS and SCM. See Andersen Report at 48, 71; Supplemental Andersen Report at 54. The examination of models by Commission staff confirms that SCIS is updated much more often than SCM. For example, in its ONA filing, US West used SCM to model 5ESS switch software version 5E5, which became available in 1989, while version 5E6.1 became available in early 1991. For the DMS-NTX40 switch, US West used SCM to model software version BCS29, which was available from March to September 1990, while version BCS31 became available in January 1992. See Andersen Report, Appendix 18; Supplemental Andersen Report, Exh. 5.

[35] See Supplemental Andersen Report at 33-35.

outdated versions of SCIS or old traffic studies. [36] PacTel contends that it is appropriate to use different versions of SCIS because BOCs have different versions of vendors' software controlling their switches. [37] BellSouth insists that it used the most current version of SCIS available at the time of its most recent traffic study, and asserts, in any event, that the effect of different SCIS versions on rates is small. [38] NYNEX notes that it did not use the most current version of SCIS for the BSEs offered by New England Telephone and Telegraph Co. (NET), but maintains that no major updates in switch technology occurred since the release of the SCIS version used by NYNEX. [39] Many carriers point out that traffic studies require considerable effort and cannot be performed on short notice. [40] Several BOCs insist that model office input data are updated on a regular basis, and that the data are updated periodically to reflect changes in demand. [41] NYNEX and US West maintain that traffic studies have little effect on BSE rates. [42] BellSouth maintains that its traffic input data varies little over time. [43]

21. We have determined, based on our internal review of SCIS and on Andersen's supplemental analysis, that SCIS will not derive accurate unit investments unless the switches used to provide BSE services (including hardware and software) for which the study is undertaken are accurately reflected in the SCIS version used in the cost analysis. [44] Use of different versions of SCIS can often have a significant effect upon SCIS outputs, and therefore, upon BSE rates. [45] To allow carriers to select any version of SCIS for investment studies, or to use models and input data that do not reflect the actual plant used to provide the service, does not lead to rates designed to recover reasonable costs as required in the Part 69 ONA Order. SCIS is a forward-looking model that calculates investment based on switch replacement costs rather than historical or embedded costs, and the more recent SCIS software provides the most up-to-date design and pricing basis from which to estimate future BSE-specific investment. Therefore, we conclude that any carrier using SCIS to develop BSE investment must rely on

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[36] Allnet Opposition at 6-7; AT&T Opposition at 9-13. See also WilTel Opposition at 39 (criticizing use of outdated versions of SCIS); Allnet Opposition at 7-8 (noting that Andersen discussed Ameritech's and NYNEX's use of old versions of SCIS); Ad Hoc Opposition, Appendix at 12-13 (recommending that the Commission require BOCs to use the most recent version of SCIS available).

[37] PacTel Reply at 2.

[38] BellSouth Reply at 26-27.

[39] NYNEX Reply, App. at 8-9, as modified by NYNEX Erratum at 2-3.

[40] NYNEX Reply, App. at 8.

[41] Bell Atlantic Reply at 6; Ameritech Reply at 6; Southwestern Bell Reply at 9-10.

[42] NYNEX Erratum at 4-5, revising NYNEX Reply, App. at 8-9; US West Reply at 15-16.

[43] BellSouth Reply at 27.

[44] WilTel complains that the Andersen Report does not adequately display the effects of using different SCIS versions on BSE rates. WilTel Opposition at 30-31. Therefore, the Bureau directed Andersen in its Supplemental Analysis to examine further the effects of different SCIS versions on BSE rates.

[45] For example, the Andersen data show that for its Multiline Hunt Group UCD Line Hunting BSE, BellSouth used an older SCIS version. Based on the older version BellSouth filed direct recurring costs of $5.91. If, however, it had used the current SCIS version, direct recurring costs would have been $3.90, or a reduction in direct costs of approximately 34 percent.
Metromedia recommends that the Commission develop some means to verify that future updates to investment models are reasonable. Metromedia Opposition at 4. We delegate authority to the Common Carrier Bureau to develop procedures for review of future model updates.

the most current version of SCIS available for its switch and associated operating software, or explain its use of an older version. [46]

22. One of the issues the staff referred to Andersen was the extent to which use of outdated traffic studies may affect calculation of BSE rates. [47] Andersen found that the age of traffic studies can significantly affect BSE rates when increases in traffic are not reflected in the SCIS investment studies. [48] We cannot rely on old traffic studies, which may no longer accurately reflect current traffic patterns, to justify BSE rates. From the Andersen information, it appears that all carriers except US West have now used traffic data and studies sufficiently recent to accurately reflect current traffic characteristics. We require all BOCs to continue to use recent traffic studies in future ONA tariff filings. Instructions for US West rate revisions are discussed in Section III.E. of this Order, infra.

23. Finally, because traffic studies are conducted less frequently than SCIS and switch revisions occur, and do not consistently affect SCIS investment outputs to the same degree, we cannot accept BellSouth's argument that SCIS versions contemporaneous with traffic studies are inherently reasonable. Carriers should use the most recent SCIS version except when they can demonstrate that a less recent SCIS, when used in conjunction with older traffic study data, does not generate investment outputs that are so distorted as to be unreasonable.

3. Cost of Money

24. SCIS allows BOCs to recognize their time value of money through a discount factor called the "cost of money" factor. The ONA Designation Order directed BOCs to justify use of a cost of money in excess of the Commission's current authorized rate of return of 11.25 percent. The BOCs argue that 11.25 percent is merely the industry average that was developed in 1989, and that this is not appropriate for a forward-looking cost model like SCIS. [49] Most BOCs also assert that variations in cost of money produce de minimis effects on BSE rates. [50]

25. The BOCs are incorrect in arguing that they should be allowed to use cost of money factors that they believe will be necessary to attract capital in the future. While the Commission's rate of return prescription reflects an industry average that was developed in

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[46] The use of an outmoded version of SCIS to reach NET rates is adequate, in light of NYNEX's explanation and demonstration that no major updates in switch technology had occurred that would affect unit investment results.

[47] See December 11 Letter.

[48] For example, the Andersen data show that for a specific switch technology, Ameritech used as an input for the Multiline Hunt Group BSE, a value of 11.8 hunt group calls terminated during the busy hour, whereas the BOC average was 5.51 calls terminated. Based on its traffic assumption of 11.8, Ameritech filed direct recurring costs of $1.22, whereas if its direct recurring costs were based on the BOC average, they would have been $0.88, or a reduction in direct costs of 28 percent.

[49] The BOCs contend that their cost of money factors represent the forward-looking cost of debt and equity. Ameritech Direct Case at 3-4; Bell Atlantic Direct Case at 3-4; BellSouth Direct Case at 27-28; Nevada Bell Direct Case at 2-3; NYNEX Direct Case, Appendix A at 3; Pacific Bell Direct Case at 3; Southwestern Bell Direct Case at 4-5; US West Direct Case at 3-5.

[50] Ameritech Direct Case at 4-5; BellSouth Direct Case at 28-29; Nevada Bell Direct Case at 3; Nevada Bell Supplemental Direct Case at 3; Pacific Bell Direct Case at 4; Southwestern Bell Direct Case at 4-5; US West Direct Case at 3-5; Bell Atlantic Direct Case at 4-5. For its part, Bell Atlantic maintains that, if it used the 11.25 percent figure for cost of money, then the unit investment for its BSEs would be reduced by an average of 1 percent for analog switches, 1.5 percent for digital switches, and in no case would the reduction be more than 6 percent. Id.

1989, it took into account fluctuations in the costs of capital in the future. [51] The BOCs have not shown that they will need a cost of money exceeding 11.25 percent to attract capital in the future. Accordingly, absent a stronger evidentiary showing, we require the BOCs to develop their BSE rates using a cost of money factor not to exceed 11.25 percent.

C. Assumptions Made When Using SCIS

1. Average or Marginal Unit Investment Studies

26. Conceptually, allocation of common investment involves two stages: (1) distinguishing common investment from BSE-specific investment; and (2) allocating common investment in an economically rational way between two or more services. In SCIS, the Average Study and Marginal Study methods are the two ways to allocate shared or "common" investment among several services (the various BSEs and BSAs). For each BSE, the common investment is combined with the BSE-specific investment for each feature. The choice of Average or Marginal Study methods has a substantial effect on the unit investment developed by SCIS.

27. SCIS implements this two-stage procedure in the following way. As a first step, SCIS broadly defines common investment as investment that is insensitive to the level of demand for the various BSEs and BSAs, up to the capacity of the switch. The SCIS term for this common investment is "Getting Started Costs" (GSCs). The dollar value of GSCs is significant and includes all hardware and software that cannot be directly assigned to lines, calls, or holding time. [52] As described below, the identification of GSCs with common investment is not, however, a final determination.

28. The next step in SCIS is determining whether the Average Study method or Marginal Study method will be used for BSE investment studies. Under the "average study" method, SCIS assigns a portion of common switching investment to each BSE (and, implicitly, to the BSAs), [53] while the "marginal study" method does not routinely assign any common switching investment to the BSEs. There are two exceptions to the latter method: where the SCIS user assumes that provision of the BSE will accelerate the exhaustion of switch capacity (the "exhaust before replacement" assumption) or for other reasons directs the model to assign some common investment to the BSE under study (the "capacity override" assumption), some common investment will be assigned. Thus, two variations of the Marginal Study method recharacterize some GSCs as demand sensitive and reassign them as BSE-specific investment. [54] Neither the usual Marginal Study method nor the Average Study method recharacterize any GSCs.

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[51] See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 7507, 7532 paras. 214-215 (1990) (1990 Represcription Order), recon. denied, 6 FCC Rcd 7193 (1991) (1990 Represcription Reconsideration Order), petitions for review docketed sub nom., Illinois Bell Telephone Co., et. al. v. FCC, No. 91-1020 (D.C. Cir., filed January 11, 1991).

[52] GSCs include central processor investment, and certain other investment associated with maintenance, testing, and certain underutilization of capacity (i.e., the cost of unused capacity that must be allocated to the various features using the switch).

[53] As required in this proceeding, the SCIS develops costs for BSEs only, not BSAs. Because BSAs are priced as the residual of total switching costs after removal of all BSE costs, however, common costs that are not assigned to BSEs are captured by BSAs.

[54] In the "exhaust before replacement" variation, SCIS analyzes the situation in which provision of a BSE causes the switch to exhaust its capacity prior to the time it would otherwise be replaced. In such a case, provision of the BSE does, in fact, cause additional GSCs and these are, therefore, assigned directly to the BSE. The "capacity override" option analyzes a similar situation, but allows SCIS users to quantify the amount of GSCs that are directly assigned to the BSE.

29. After thus adjusting GSCs to recognize any exceptions directed by the SCIS user, the Average Study method allocates a portion of the adjusted GSCs to the BSE. Under the Average Study method, GSCs are allocated to each BSE based on relative central processor usage (cycles or milliseconds per busy hour, depending on the type of switch). The Marginal Study method allocates no *adjusted* GSCs to the BSE.

30. To determine the reasonableness of this aspect of BOC ratemaking, the Commission must first determine whether the BOCs have reasonably identified common investment. Distinguishing common investment from other switching investment is a difficult problem, both conceptually and practically. Whether or not investment is identified as common depends on assumptions made about such matters as the expected life, capacity, utilization and type of the switch. In large part, decisions concerning these matters properly rest on the expertise of the companies' engineers and cost analysts. Unless there is reason to believe that the companies have relied on unreasonable analysis, the Commission normally defers to their judgment. In the ONA context, neither the Commission's review nor the Andersen report has revealed obvious reliance on unreasonable analysis. Thus we believe, at present, that the BOCs' identification of common investment by the SCIS model is reasonable.

31. The second stage of our analysis requires that we determine whether the BOCs have reasonably allocated common investment to the BSEs. Several commenters suggest that we should prescribe use of the SCIS marginal investment study, because they believe BOCs should not include common switching investment in BSE rates. [55] Southwestern Bell and BellSouth claim that marginal investment studies produce the appropriate cost floor on which to base rates. [56] In contrast, MCI argues that investment developed through marginal investment studies allow SCIS users to underprice some services, which MCI believes would lead to overpricing of other services. MCI also maintains that the marginal investment study as described by BellSouth is flawed, because additional demand leading to premature switch exhaustion is not considered. [57] We believe that the switch exhaustion assumptions used by BellSouth are reasonable. *See* n. 25, *supra*.

32. The allocation of common investment among various services in an economically rational way has been a subject of considerable study by economists, regulators, and other public policy makers. One traditional method of allocating common investment is the fully distributed cost (FDC) method in which common investment is allocated based on measures of relative use. Other methods of allocating common investment include the Ramsey pricing method, which looks to the characteristics of demand for several services rather than their use

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[55] Bell South Direct Case at 21-22; Southwestern Bell Direct Case at 2; Wiltel Opposition at 5-8; Metromedia Opposition at 7; Allnet Opposition at 4-5. But see Ameritech Reply at 4-5; GSA Opposition at 4 (reasonable arguments can be made for either Average or Marginal). See also Ad Hoc Opposition, Appendix I, at 6-8 (Use of Average or Marginal Cost Analysis is of secondary importance to the BOCs' assumptions regarding switch exhaustion); BellSouth Direct Case at 14-21 (the ONA investigation should focus on whether the pricing methodology is reasonable rather than whether it differs from the methodology of other BOCs).

[56] Southwestern Bell Direct Case at 2; BellSouth Direct Case at 9-12.

[57] MCI Opposition at 5-8; 9-11. Practically, the result would be that, to the extent that BSE rates failed to recover overhead costs, those costs would be recovered through the local switching BSA rates.

of common investment to determine appropriate prices. [58]

33. Applying the Average Study method to common investment most closely resembles FDC; all BSEs and BSAs receive allocations of common investment based on relative use of, e.g., the central processor. The Marginal Study method departs from FDC in generally allocating no common switching investment to the BSEs, though as noted, some options in the Marginal Study method will allocate some common switching investment. Depending on the relative elasticities of the BSEs and BSA, the marginal study method may, in fact, enable a Ramsey pricing approach. Without knowledge of the relative elasticities, however, it is not possible to determine whether this would be the case. [59] Because there is an insufficient record in this proceeding regarding the theoretical and practical implications of the use of Ramsey pricing, we believe it is premature to endorse that approach. We note, however, that the Marginal Study method has the advantage of encouraging, through lower BSE prices, innovative services employing BSEs. We find that this advantage outweighs the very small increase in BSA prices that will be passed through to interstate switched access rates as a result. We therefore permit the use of the Marginal Study method for ONA.

34. At this stage, however, the implications of the marginal and average study methods for pricing individual BSEs are not fully developed, and there is insufficient evidence in the record from which to require use of either method. Although future experience may prove one of the methods, or some other method, preferable, we believe at this time that neither method is unreasonable for purposes of pricing ONA services. Therefore, we allow the LECs the flexibility to employ either method. [60]

2. Accuracy of Switch Prices

35. The SCIS model allows BOCs to develop unit investments on the basis of different cost assumptions about the switches. Under the "engineered, furnished, and installed" assumption, the switch price includes the costs of actually installing the switch; under the "material" assumption, the price includes only the price of the switch itself. Parties have argued for a prescription of one method or the other, or a loading factor to reflect the difference between the two. [61] NYNEX and BellSouth maintain that, because the carriers' actual ordering and

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[58] See Ramsey, F., "A Contribution to the Theory of Taxation," Economic Journal, Vol. 37, No.1, pp. 47-61, 1927. See also, e.g., William Baumol, Economic Theory and Operations Analysis, pp. 513-16, and Kenneth Train, Optimal Regulation, Chapter 4. See also Allnet Opposition at 4-5 (arguing in favor of Ramsey pricing). Essentially, this method is based on the assumption that, in monopoly markets, overall consumer welfare is maximized by allocating common costs in proportion to the utility of the service to the consumer. Under this method, services for which demand is relatively elastic would be allocated a proportionately small amount of common costs, and services for which demand is relatively inelastic would be allocated a proportionately larger amount of common costs. As an example, consider several word processor users connected to a central processor. The central processor's software is configured for a multi-user environment and the cost of the software is fixed and will not vary with the number of users, up to a certain capacity. An FDC standard might assign the costs of the software to word processor users based on each user's total minutes on the system. A Ramsey pricing standard would assign the costs of the software to users based on its utility to each customer. Those for whom the ability to use the system was essential would be assigned a higher per minute cost than those for whom system use was discretionary. Such a standard would involve estimating elasticities of demand for each class of users.

[59] Because BSEs have not been generally available to customers, no studies have been conducted regarding the relative demand elasticities of BSEs and BSAs. No party has provided us with convincing arguments regarding the relative elasticities of the BSEs and BSAs. But see Allnet Opposition at 5; Metromedia Opposition at 6-7.

[60] However, a single investment study method must be used consistently across a study area to reach closure for overall investment, and all study areas included in development of a specific rate should employ the same investment study method.

[61] Ad Hoc Opposition, Appendix I, at 12.

installation practices vary, we should permit carriers to select the switch costing investment methodology that comports with their actual practice regarding the booking of installation costs. [62] We agree with NYNEX and BellSouth that no instruction is necessary in this area.

D. SCIS Output Issues

1. Embedded or Prospective Costs

36. In order to identify the direct cost of a service, a carrier must first identify the inputs necessary to provide the service. To translate these inputs into costs, carriers must choose either the inputs that are reflected in its current mix of facilities, at the price it originally paid for those inputs, i.e., embedded costs, or the inputs it would purchase today at the price it would have to pay to purchase those inputs today, i.e., prospective or "forward-looking" costs.

37. BOCs develop BSE rates from a weighted average of switch-specific SCIS investment costs. These weighted averages can be based on the current, or "embedded," mix of switches used by the BOCs to provide BSEs, or on a future, or "prospective," mix of switches. In the ONA Investigation Order, the Bureau identified as an area of concern the appropriate mix of switching technologies on which to base BSE rates. Specifically, the Bureau noted that many BSEs are more expensive to provide from older switch technologies than from newer switches. The Bureau tentatively found that a prospective view might more accurately reflect the direct costs of providing BSEs in the future, and might also encourage cost-effective technological improvements by discouraging BOCs from using old and costly types of switches when more cost-effective types of switches are available. [63]

38. All BOCs, including those who do not include analog switch costs in their BSE rates, maintain that it is appropriate to include analog switch costs in BSE rates. Several BOCs plan to continue to use analog switches to provide BSEs for the foreseeable future, and in some cases it is more economical to expand capacity in an analog switch to provide a BSE than to replace it with a digital switch. [64] Pacific Bell and BellSouth maintain that including analog switch costs in BSE rates would be a forward-looking approach for those carriers who intend to continue using analog switches. [65] US West believes it is appropriate to include analog switch costs in BSE rates because, at the time US West conducted some of its cost studies, the BSEs were available only from analog switches. [66] Several carriers assert that some BSE rates go up when analog switches are excluded from the technology mix, [67] and staff review and the independent auditor's analysis confirm this.

39. Many intervenors contend that the BOCs' arguments contending that analog switches

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[62] BellSouth Reply at 27; NYNEX Reply, App. at 9-10.

[63] ONA Investigation Order, 7 FCC Rcd at 1515, paras. 17-18.

[64] Ameritech Direct Case at 5-6; Bell Atlantic Direct Case at 5-6; NYNEX Direct Case, Appendix A at 4; Pacific Bell Direct Case at 5-6; Southwestern Bell Direct Case at 5-6.

[65] Pacific Bell Direct Case at 5-6; BellSouth Direct Case at 29-31. See also Southwestern Bell Direct Case at 5-6 (use of "embedded" technology mix is appropriate when carrier plans to continue to use that technology mix.)

[66] US West Direct Case at 5-6.

[67] Ameritech Direct Case at 6 and Att. C; Bell Atlantic Direct Case at 6-7; NYNEX Direct Case, Appendix A at 4-5; Pacific Bell Direct Case at 6 and Att. C; US West Bell Direct Case at 6.

should be included miss the point. Rather, the issue should be whether analog switches will be used to replace existing switches in the future.[68] Wiltel emphasizes that, although some individual BSE rates would go up if analog switches are included, total expected BSE revenue would decrease by 61 percent.[69] Alternatively, Ad Hoc believes it is reasonable to base technology mix on the existing mix of switch facilities, since estimates of future technology mixes are open to BOC manipulation.[70] However, if a forward-looking technology mix is used, Ad Hoc believes it is very important to insure that the cost development and ratemaking factors utilized by the BOCs are consistent with their engineering plans over a reasonable period of time, such as three years, and that this projection is adequately documented.[71] GSA believes that the BOCs have shown that their use of analog switches in establishing technology mixes is not unreasonable.[72] Most BOCs and most intervenors agree that a prospective technology mix is preferable, although they disagree on the extent to which this should include analog switches.[73]

40. The Part 69 ONA Order specifies that rates for BSEs must be cost supported under the new service standard for price cap filings.[74] We conclude that, for purposes of this proceeding, prospective costs are the economically relevant costs to use to support BSE rates, because they represent the costs a profit maximizing firm would consider in making a business decision to provide a new service.[75] Historical costs associated with plant already in place are essentially irrelevant to the decision to enter a market since these costs are "sunk" and unavoidable and are unaffected by a new product decision. We also believe that use of prospective costs for new BSEs is in the public interest, because the resulting generally lower BSE prices will encourage innovative services.[76] In contrast, the embedded technology mix advocated by Ad Hoc would not provide the desired economic incentives for BOCs to provide BSEs.[77]

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[68] Wiltel Opposition at 9-11; Allnet Opposition at 6-7; Metromedia Opposition at 4-5.

[69] Wiltel Opposition at 11-13.

[70] Ad Hoc Opposition at 8.

[71] Ad Hoc Opposition, Appendix I, at 9-10. See also MCI Opposition at 13-21.

[72] GSA Opposition at 5.

[73] Ameritech Direct Case at 5-6; Bell Atlantic Direct Case at 5-6; NYNEX Direct Case, Appendix A at 4; Pacific Bell Direct Case at 5-6; Southwestern Bell Direct Case at 5-6; Pacific Bell Direct Case at 5-6; BellSouth Direct Case at 29-31; Wiltel Opposition at 9-11; Allnet Opposition at 6-7; Metromedia Opposition at 4-5; GSA Opposition at 5. See also Southwestern Bell Direct Case at 5-6 (use of "embedded" technology mix is appropriate when carrier plans to continue to use that technology mix.)

[74] Part 69 ONA Order, 6 FCC Rcd at 4529, para. 25.

[75] *See* MCI Comm. Corp. v. AT&T Co., 708 F2d 1081, 1116-17 (7th Cir. 1983); Areeda and Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 716 (1975).

[76] The Supplemental Andersen Report indicates the effect of altering the ratemaking process to rely on embedded technology mixes would be to increase aggregate BSE rate levels. For example, the Andersen data indicate that the average investment required to support the ANI BSE using prospective technology weightings is $0.000334, and $0.000612 using embedded technology weightings, an average increase of 83 percent in average investment required to support ANI.

[77] In the ONA Designation Order, 7 FCC Rcd at 2605, BOCs were directed to reconcile use of embedded technology mixes with the four goals of BSE pricing we announced in the Part 69 ONA Order, 6 FCC Rcd at 4531, para. 38. None of the parties' responses leads us to reconsider the conclusion we reached above, that a prospective technology mix is the most reasonable method by which to develop BSE rates. US West Bell Direct Case at 6; Ameritech Direct Case at 6; Metromedia

41. We therefore hold that the filed ONA rates, to the extent they are based on the carrier's technology mix and costs associated with embedded investment, are unjust and unreasonable. We further determine, under our prescriptive authority contained in Section 205 of the Communications Act, that ONA rates developed from technology mix and associated cost data which reflect a prospective view of the carrier's investment are, to the extent that rate levels are determined by these factors, just and reasonable.

42. We also conclude that a forward-looking technology mix may properly include analog investment whenever the carrier plans to use analog switches in the future. Five out of seven BOCs with analog switches in their technology mixes argue that it is appropriate to include these switches because they will continue to be in service in the future. In other words, these BOCs maintain that a prospective technology mix may reasonably include analog switches. The Commission finds these arguments to be persuasive. Our requirement to justify inclusion of analog switches should adequately protect against the manipulation of projections feared by Ad Hoc.

43. Ameritech and NYNEX did not base their BSE rates on a forward-looking technology mix, and therefore are hereby ordered to recalculate their BSE rates based on a forward-looking technology mix, i.e., on the basis of current and future switch purchasing decisions. In future ONA filings, BOCs must continue to use a prospective technology mix for the weighing of SCIS investment results, and to explain the basis for including any analog switching equipment in that mix. [78] Unlike the other methodological instructions directed to BOCs in this Order, which recognize that some circumstances may require different treatment, this determination constitutes a formal prescription under Section 205 of the Communications Act, 47 U.S.C. § 205.

2. Excessive Estimates for Direct Costs and Overhead Loadings

44. Typically, in the ratemaking process, rates are set to recover the sum of direct costs and overheads. Direct costs, which are predominantly capital costs and other plant specific costs, are closely linked to direct investment and are, therefore, usually calculated using direct investment as a starting point. Overheads, in turn, are usually calculated using direct costs as a base. In acknowledging this typical ratemaking process, the Part 69 ONA Order required carriers to provide ratios for each BSE for (1) direct cost to direct investment; and (2) price to direct cost. [79] In this section, we discuss carriers' estimates of direct costs and overheads.

45. Initial staff review of the tariff filings indicated that direct costs for BSEs were generally calculated from annual cost factors developed from internal company records. These cost factors were applied to the BSE-specific unit investment to calculate annual direct costs. Because most companies based their factors on internal records, the resulting factors could not be evaluated. As a result we cannot determine whether the direct costs are reasonable. Also, to the extent overhead loadings are usually based on direct costs, the reasonableness of the

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Opposition at 5-6, citing Part 69 ONA Order, 6 FCC Rcd at 4531, para. 38.

[78] NYNEX asserts that BOCs should be permitted flexibility to adjust technology mix assumptions to adapt to market conditions. NYNEX Direct Case, Appendix A at 5. However, since at any given time a BOC has only one technology mix reflecting its existing network, it would be unrealistic to permit a BOC to adjust switch mixes for a particular BSE or market.

[79] Part 69 ONA Order, 6 FCC Rcd 4524, 4531 at para. 44.

carrier's overheads is questionable.

46. With specific respect to overheads, the staff initially compared overhead ratios [80] among the carriers and identified BellSouth's and US West's overhead loadings factors as being significantly higher than other carriers'. Accordingly, in the ONA Designation Order, the Bureau directed BellSouth and US West to justify their loadings factors. BellSouth asserts that its overheads loading factor is based on the ratio of total local switching revenues to total local switching incremental costs. BellSouth explains that this loading factor is similar to the loading factor it uses for non-ONA new services. BellSouth insists that this is one of several possible reasonable overhead loading methodologies. [81] BellSouth states that the ONA investigation should focus on whether each carrier's pricing methodology is reasonable, rather than whether it differs from the methodology of other BOCs. [82] According to BellSouth, with the application of the local switching loadings factor, rates for the new services are established in the same relationship to their incremental costs as are existing local switching services priced with respect to their incremental costs. [83] The local switching revenues data for BellSouth are publicly available and can be verified. [84] However, the local switching incremental costs data are not publicly available. To develop its factor, BellSouth claims direct costs of approximately $125 million without explanation. Absent a clear, verifiable explanation of the method, including an explanation of direct costs, the method cannot be deemed reasonable.

47. Similarly, US West believes its overhead loadings only appear excessive, because it uses overhead loading methodologies different from those of the other BOCs, but notes that its BSE rates are not excessive relative to those of the other BOCs. [85] US West asserts its overhead loading factor is the ratio between its local switching revenue requirement and its local switching direct costs. [86] However, while US West provides total local switching costs from its 1990 ARMIS Report 43-01, it fails to provide a clear, verifiable explanation for its direct costs.

48. MCI contends that these administrative overhead loadings are evidence that BOCs are permitted too much flexibility to manipulate their rates based on marketing rather than cost considerations. MCI asserts these manipulations permit BOCs to price non-competitive BSEs

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[80] Overhead ratios are the quotient of price divided by unit direct cost.

[81] BellSouth Direct Case at 33-34.

[82] As explained later in this section, while the initial designation of issues respecting overhead factors used by BellSouth and US West was based in part on their divergence from other carriers' factors, our determination that their factors are not justified on the present record relies on an independent, case-by-case review of their ratemaking methods, and the staff's development of a contingent, ARMIS-based reasonableness analysis as a benchmark for application when the carriers do not justify their methods.

[83] BellSouth Direct Case at 34.

[84] BellSouth claims it used 1990 recurring local switching basket revenues of approximately $399 million which is not unreasonable since its 1991 TRP reflects local switching revenues of approximately $400 million.

[85] US West Direct Case at 7-8.

[86] US West maintains that it developed its overhead loading factors on a Part 69 category basis from the 1990 ARMIS 43-01 Report. Specifically, US West divides its 1990 fully distributed cost (FDC) revenue requirement by the sum of the 1990 direct unit cost times 1990 demand for each rate element in that Part 69 category. Id. at 8-9 and Appendix D; US West Reply at 7-8. US West fails, however, to substantiate the method by which direct costs used to develop its overhead loading factors were calculated.

unreasonably high, and price BSEs that do not face competition unreasonably low. [87] MCI also maintains that the marginal investment study as described by BellSouth is flawed, because it fails to consider additional demand leading to premature switch exhaustion. [88] Metromedia believes that US West cannot justify an overhead loading factor greater than the overhead loading factors of other BOCs merely by stating it uses a different overhead loading methodology. [89] Ad Hoc asserts that it does not have sufficient information to determine whether these overhead loadings are excessive. [90] GSA maintains that, although the overhead loadings of BellSouth and US West appear excessive, the resulting rates do not appear excessive relative to other BOCs' rates, and therefore not unreasonable. [91]

49. While we authorized some carrier flexibility in methods used to determine both direct costs and overheads in the Part 69 ONA Order, we are concerned that some carriers have used cost allocation methods that have resulted in excessive direct costs and overheads, which in turn has led to excessive rates and contributed to dramatic rate variances between companies. On the present record, we have been unable to identify any reasonable explanation for direct costs claimed by a number of companies and for overhead loading factors selected by BellSouth and US West. The direct costs and overhead loadings claimed by these companies appear unreasonable and, absent further justification of their method, the companies specified in Attachment C must reduce their rates to reflect lower direct costs and overheads, as described below.

50. The absence of reasonable explanations by the carriers of their direct costs, and of BellSouth's and US West's overhead loadings, require that we conclude that the LEC ONA rates are not supported. [92] For example, the direct cost factors were based on "internal studies" that were never filed or reviewed at the Commission, and which are not currently available. We will therefore require carriers to refile their ONA rates, providing justification for their rates now in effect, or adjusting ONA rates to a level that can be justified. If the LECs fail again on refiling to provide adequate justification for their rates, we believe that the use of the ARMIS database to calculate an upper limit for both direct costs and overheads would be reasonable, using the ARMIS data the company itself provides to the Commission. [93] Therefore, upon refiling of ONA rates, we will evaluate any justifications the LECs offer in

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[87] MCI Opposition at 21-25.

[88] MCI Opposition at 6-8. As described in Section III.C.1., the carrier exercises its judgment when performing investment studies with respect to the probability that a switch will exhaust prematurely due to additional demand, and we have not constrained the carriers' flexibility in this respect.

[89] Metromedia Opposition at 8.

[90] Ad Hoc Opposition, Appendix I, at 10.

[91] GSA Opposition at 5-6.

[92] Our examination of rates included an analysis of the direct cases, as well as how the filed direct cost factors compared to recent cost data in the ARMIS database. We examined the relationships between (1) direct costs and direct investment (direct cost ratio) and (2) total cost and direct cost (overhead ratio). As specified in Attachment C, the ARMIS comparison revealed all BOCs other than New England exceeded ARMIS estimates of direct costs. Also, as specified in Attachment C, BellSouth and US West exceeded ARMIS estimates of overhead loadings. Thus, our review of existing data on file at the Commission did not provide any independent justification for the ONA rates as filed.

[93] The ARMIS data is a reasonable basis for alternative overhead calculations, and is the only verifiable alternative method available. Our use of ARMIS in the ONA context should not be construed as approving ARMIS as an ideal standard, or as applicable to all circumstances where overhead calculations are questioned, but its use appears reasonable in this instance.

support of direct cost ratios or overhead ratios.

3. Non-uniform Administrative Overhead Loadings

51. In the Part 69 ONA Order, we required each BOC to load overhead costs onto each of its BSE rates in a manner consistent with the overhead loading methodology used for its other BSEs, or to justify any inconsistencies. [94] The majority of BOCs claim any apparent nonuniformity in their overhead loading ratios is due to mathematical rounding. [95] Pacific Bell alleges that its overhead loading for the Network Reconfiguration BSE is different from the loadings for other BSEs because Network Reconfiguration is a special access service and the other BSEs are switched services. [96] MCI rejects Pacific's argument regarding special access, and asserts this is another example of improper manipulation of costs. [97] Ad Hoc asserts that it does not have sufficient information to determine whether the nonuniform overhead loadings are reasonable. [98] GSA asserts that the BOCs have given reasonable explanations for their nonuniform loadings. [99]

52. We conclude that the nonuniform loadings at issue here, whose nonuniformity is due solely to mathematical rounding, are reasonable. Since the BSE rates in these cases are fractions of a cent per unit, it is often very difficult for carriers to load overhead costs on BSEs at exactly the same rate for all. Similarly, as the overhead loadings for special access services have always been different from those for switched access services, we find that PacTel has in this instance adequately justified its nonuniform loading for Network Reconfiguration. [100]

4. Differences Between BSE Rates and Unit Costs

53. The Bureau's designation Order directed the BOCs to justify any differences between BSE rates and the total unit costs, including a reasonable rate of return, used to derive those BSEs. Some BOCs claim the differences between unit costs and rates for some BSEs are due to rounding. [101] Nevada Bell and Southwestern Bell maintain that they must set some BSE rates

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[94] Part 69 ONA Order, 6 FCC Rcd at 4531, para. 44.

[95] Ameritech Direct Case at 7-8; BellSouth Direct Case at 37-39; Southwestern Bell Direct Case at 6-7; US West Direct Case at 10-11.

[96] Pacific Bell Direct Case at 7-8; PacTel Reply at 6-7.

[97] MCI Opposition at 25-26.

[98] Ad Hoc Opposition, Appendix I, at 10.

[99] GSA Opposition at 6.

[100] Southwestern Bell and BellSouth assert that, in the future, carriers should be free to use nonuniform overhead loadings when market conditions would make it advantageous to do so. Southwestern Bell Direct Case at 6-7; BellSouth Reply at 5, 7, 9-10, 17-18. Because no BOCs advocate specific nonuniform loadings in order to "adapt to market forces," we need not reach BellSouth's and Southwestern Bell's argument at this time.

[101] Bell Atlantic Direct Case at 7-8; BellSouth Direct Case at 39-40; NYNEX Direct Case, Appendix A at 7-8; Pacific Bell Direct Case at 8.

above unit costs to establish nonpremium rates for those BSEs. [102] For Multiline Hunt Group and Multiline Hunt Group - Uniform Call Distribution, Nevada Bell set its rates assuming that it would use other technologies in the future to provide those BSEs. [103] For Multiline Hunt Group - Preferred, Ameritech set the rate equal to a weighted average of other hunt group BSEs. [104] NYNEX set its interstate Three Way Calling BSE rate equal to its intrastate BSE rate to avoid "arbitrage" between jurisdictions. [105] NYNEX alleges that if interstate rates are reduced below intrastate rates, customers will choose the least costly alternative. This would result in an overall decrease in net revenue. NYNEX therefore asserts that the Part 69 ONA Reconsideration Order permits it to use the net revenue test to justify a rate otherwise unsupported by a cost showing. [106]

54. According to AT&T, the only discrepancies permitted by the Part 69 ONA Order are rates set using a risk premium, and AT&T maintains that NYNEX has not justified a risk premium. [107] MCI and AT&T believe that NYNEX's explanation regarding migration from intrastate to interstate BSEs to be insufficient to justify the interstate BSE rate and assert that the Bureau has rejected similar arguments in the past. [108] Metromedia asserts that Nevada Bell simply set its ANI rate as high as possible consistent with revenue neutrality for ONA services as a whole. [109] GSA asserts that the BOCs have given reasonable explanations for the differences between unit costs and rates; namely, differences due to rounding. [110]

55. We find the slight discrepancies between unit costs and rates that result from mathematical rounding do not make the rates unreasonable. For the same reason as was discussed in Section III.D.3. above, it is often very difficult for carriers to set BSE rates exactly equal to unit costs when BSE rates are fractions of a cent per unit. We also find that to set prices of similar Multiline Hunt Group BSEs equal, as Ameritech did, is reasonable. However, we reject NYNEX's "arbitrage" argument that it must set its interstate rate at the intrastate level. In the ONA Investigation Order, the Bureau noted that claims of potential tariff shopping had been considered in the Part 69 ONA Order, were the subject of a petition for partial

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[102] Nevada Bell Direct Case at 3-4; PacTel Reply at 7; Southwestern Bell Direct Case at 7-8. Nonpremium rates are rates for access services of lesser quality than was available to AT&T prior to divestiture of the Bell System. The Commission's Rules require BOCs to establish nonpremium local switching rates by multiplying premium rates by 0.45. See Section 69.113 of the Commission's Rules, 47 C.F.R. § 69.113.

[103] Id.

[104] Ameritech Direct Case at 9 and Att. 3. For Call Detail Reporting (CDR), Ameritech asserts the difference between direct costs and rates is necessary to recover the costs of mailing reports to customers, and to recover a portion of non-recurring costs. Ameritech claims CDR would be prohibitively expensive if the non-recurring costs were recovered exclusively through a non-recurring charge. Ameritech Direct Case at 8-9. For reasons discussed below, we find that Ameritech's CDR is a detariffed billing and collection service and order that it be detariffed. Therefore we do not need to reach the issue of whether Ameritech's tariff would be just and reasonable if CDR were a tariffed service.

[105] NYNEX Direct Case, Appendix A at 6-7; NYNEX Reply at 5-6.

[106] NYNEX Reply at 5-6.

[107] AT&T Opposition at 7. See also MCI Opposition at 27, citing Part 69 ONA Reconsideration Order, 7 FCC Rcd at 5235.

[108] MCI Opposition at 27; AT&T Opposition at 8-9, citing ONA Investigation Order, 7 FCC Rcd at 1522.

[109] Metromedia Opposition at 8-9.

[110] GSA Opposition at 6.

reconsideration, and so would not be considered in the context of this tariff proceeding. [111] NYNEX has provided no reason to reconsider this conclusion in this context. NYNEX's reliance on our discussion of the net revenue test in the ONA Reconsideration Order is misplaced. In that Order, we noted that a requirement of uniform loadings for new and existing services might lead to a reduced recovery of overhead costs, and so might discourage companies from offering new services. [112] This situation is distinguishable from the claims of jurisdictional arbitrage that NYNEX makes here. Accordingly, we direct NYNEX to establish interstate BSE rates equal to the total unit costs of providing those BSEs.

E. US West Unit Investment Studies

56. We now consider several unique issues raised by US West's reliance upon its own SCM software model, in conjunction with SCIS, to develop unit investment for BSEs. Of the 24 BSE rates in US West's filing, 15 were developed from the pre-1987 version of SCIS. The remaining nine BSE elements were developed from US West's SCM model. [113] As discussed below, we find that US West has failed to meet its burden of showing that its BSE rates are just and reasonable.

57. The Part 69 ONA Order requires that "the same methodology must be used for all BSEs unbundled from local switching." [114] The reasons for the requirement are fundamental. First, it is not reasonable to assume that multiple investment models, even if individually valid, would necessarily lead to a consistent allocation of costs for individual services. Our in camera review of the SCIS software reveals the complexity of these models, and the numerous assumptions made in their development. Thus, if a carrier used one method to develop the investments associated with a specific switch technology for half the BSEs provided by that switch, and a different method for the remaining BSEs, there is no reason to expect that the several investments developed under the two methods would sum to the total cost of the switch. [115] Second, a single methodology minimizes obscurity and complexity in a process that inherently resists simplification. If prices of unbundled BSEs are to stand in some reasonable relation to one another, the complex interactions within a single investment model, which have already occasioned substantial procedural burdens beyond the usual tariff review process, should not be multiplied by the challenge of using two such models to disaggregate the costs of a single switch technology.

58. These are general considerations that may not apply invariably to specific methods. Therefore, we need to determine whether using these two software models satisfies the

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[111] ONA Investigation Order, 7 FCC Rcd at 1522, para. 73.

[112] ONA Reconsideration Order, 7 FCC Rcd at 5236-37, paras. 8-11.

[113] US West did not offer any justification for its reliance upon these two models in the cost support initially filed with its ONA tariff. US West also did not submit the pre-1987 SCIS version it used to develop the majority of its BSE rates in January 1992, as was required by the SCIS In Camera Order. In April 1992, US West explained which software had been used to develop each of its 24 BSEs, and offered to submit the SCIS software it had used. Letter from A. Lim to J. Cimko, Chief, Tariff Division (April 16, 1992).

[114] Part 69 ONA Order, 6 FCC Rcd at 4531.

[115] For the SCIS and SCM models, each model office is engineered according to the vendor's recommended engineering specifications. The total engineering costs are determined and compared to the model office data to validate the SCIS and SCM models. No comparable aggregate validation of a "half-and-half" model that uses SCIS to develop some BSE investments and SCM for others is possible.

requirement that BOCs develop all their BSE rates using a consistent methodology. As a threshold matter we note that US West has used an out-of-date SCIS model, incorporating comparably out-of-date vendor pricing data and operating software, for some of its investment studies. Its SCM model used for other BSE investment studies is similarly based on older vendor hardware and software. [116] US West has not sought to justify these practices as based on its continuing use of, e.g., older switch software in its operations. Indeed, a US West letter filed January 15, 1993, suggests some BSEs may become unavailable as the carrier increases its reliance in the future on digital switches. Absent a justification for these practices, we conclude that the US West rates are unlawful because they are based on outdated software and associated vendor data. [117] Therefore, US West has failed to meet its burden of proving that its rates, which are computed using these models, are reasonable.

59. We now examine the combined application of these two outdated software models. While we need not consider whether the combination of two such investment models invariably conflicts with the Part 69 ONA Order requirement that a consistent methodology be employed in cost-justifying BSEs, it is clear that SCIS and SCM are not sufficiently similar in structure and process to be considered a consistent methodology. This dissimilarity makes a quantitative comparison of the effects of these combined investment study processes with a single, consistent method extremely difficult. Nor is it possible to determine whether SCIS and SCM would produce the same set of outputs from a given set of inputs. These conclusions are endorsed by the independent auditor. [118] Thus, aside from its reliance on outdated software, US West has sought to combine in its ratemaking process two models that, considered together, cannot provide a consistent investment methodology for all unbundled BSEs. US West has not met the requirements of the Part 69 ONA Order in this respect and on this ground as well, its rates developed using this method have not been established as reasonable.

60. In addition to the significant difficulties posed by its use of two outdated investment models, the US West submission presents several other ratemaking deficiencies, which we have discussed more generally elsewhere in this Order. For example, US West provides no reasonable explanation for using only central offices in its central region to develop model offices for Make Busy Key and Message Delivery. Nor has US West shown that its central region is representative of its entire service territory. [119] Also, US West has used overstated overhead loadings, and should reduce those loadings to conform with loadings consistent with

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[116] Andersen Report, Appendix 18 at 5.

[117] See Section III.B.2. of this Order, supra.

[118] Supplemental Andersen Report, January 15, 1993, Section 4, at 5-6. Our in camera review, confirmed by the independent auditor's report, identifies numerous obstacles to using SCIS and SCM in an integrated manner to develop BSE investments. In a January 15, 1993, letter to the Common Carrier Bureau, Tariff Division, US West announced its intent to develop the BSE rates in its 1993 annual access filing using a later version of SCM (SCM II), and excluding any reliance on SCIS. While the letter characterizes SCM II as having no effect on unit investment studies, an attachment to the letter suggests that the contemplated unit investments for the 1993 annual access filing diverge dramatically from those contained in the direct case in this docket. As US West has indicated its intent to abandon efforts to use SCIS and SCM in tandem, we only note two of the problems: (i) the SCIS and SCM inputs are based on different assumptions, and the inputs for each model cannot be adapted for use in the other model without making further assumptions that will alter study results; and (ii) the SCM model is composed of two distinct software components, linked by external calculations, while SCIS is a self-contained model. In sum, the differences between the models are so significant that after consultation with the independent auditor, the Bureau determined that to attempt a rate sensitivity analysis including the US West rates would entail an effort disproportionate to any useful result.

[119] See Section III.B.1. of this Order, supra.

its ARMIS data. [120]

61. We therefore conclude that US West has failed to meet its burden of proving that its ONA rates filed November 1, 1991, are just and reasonable, because they are unsupported by a consistent unit investment methodology, which is an integral element of the cost support specified in the Part 69 ONA Order.

62. Given the substantial deficiencies in US West's rate development, we would normally prescribe replacement ONA rates rather than allow the unlawful rates to remain in effect on an interim basis. Several considerations, however, persuade us that this approach would not best serve the public interest in the present circumstances. First, and of primary importance, the initial demand for unbundled BSEs has been modest and because their rates were developed on a revenue neutral basis compared to feature group arrangements, few if any customers have been significantly burdened by these BSE rates. Because ONA is designed to be revenue neutral, excessive BSE rates are offset somewhat by lower BSA rates, although BSE rate adjustments may not be offset exactly by BSA rate adjustments given the uncertainties of ONA demand. In addition, under the terms of the Third Further Reconsideration of Part 69 ONA Order, [121] BOCs will be permitted to continue to offer feature group arrangements. So long as the feature groups will likely remain available as an option for US West's local switching customers, [122] there is little prospect that the US West subscribers most affected by unlawful BSE rates will be constrained to take service under those rates unless that alternative is preferable to the feature group configuration. [123] Moreover, given the deficiencies in the US West method and the corrective adjustments imposed on other carriers, we lack an adequate basis from which to prescribe replacement rates. The development of rates for individual BSE elements is a particularly complex undertaking when proprietary computer models must be utilized to perform investment studies, and in US West's case that process might well be further complicated if the operational and support difficulties encountered in reviewing the original SCM model persist in the replacement model.

63. These considerations, however, do not vitiate the requirement that US West promptly develop replacement ONA rates, based on a single investment study method and otherwise consistent with the methodological requirements of this Order. Implementing ONA on a basis consistent with our announced goals of enhancing competition and avoiding unreasonable pricing practices requires that US West expedite a curative tariff filing, failing which we will prescribe replacement rates. [124] US West should also submit as part of any replacement filing full documentation and software for the expanded SCM model, to facilitate initial in camera review by staff and any subsequent referral to an independent auditor.

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[120] See Section III.D.2. of this Order, supra.

[121] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 8 FCC Rcd 3114 (1993) (Third Further Reconsideration of Part 69 ONA Order).

[122] See US West Reply in Third Further Reconsideration, filed Oct. 18, 1991, at 3.

[123] To the extent that customers have paid US West's unlawful BSE rates and are constrained to continue doing so pending reformation of those rates, the Commission's formal complaint process provides recourse for parties seeking refunds.

[124] Should US West not file replacement rates within 60 days, or should those rates entail investigation, we will consider prescribing interim BSE rates based on an average of the other BOCs' revised rates, in the absence of any more rigorous basis for an alternative.

IV. OTHER ISSUES

A. Other Designated Issues

1. Southwestern Bell Packet Switching BSE Rates

64. Background. The Bureau designated as an issue in this investigation "Are the rates for Southwestern Bell's packet switching BSEs excessive?" The Bureau specifically directed Southwestern Bell to provide the following information regarding its packet switching BSE rates:

> (a) The classification and amounts of investment underlying each of the nine BSEs tariffed in Transmittal No. 2146, and the methods used to determine investment.
>
> (b) Identification of and full documentation for all direct costs and overheads applied to the investment identified above, and a description of the ratemaking methods used, and if the ratemaking methodology differs from the method used for other Southwestern Bell switched access BSEs, an explanation of why a different method was used.
>
> (c) For ONA elements priced substantially above cost, and allegedly priced to avoid arbitrage between the jurisdictions, an explanation of why it believes avoiding arbitrage justifies such pricing and of the basis for its expectation that significant arbitrage would result absent such pricing adjustments.

65. Pleadings. In response to (a), Southwestern Bell asserts that it charges nonrecurring rates for seven of the nine BSEs offered in Transmittal 2146, based on one time labor expenses. Southwestern Bell further asserts that only the Customer Alerting and Menu Server BSEs have recurring rates. [125] For (b), Southwestern Bell asserts that packet services are excluded from price cap regulation, and claims this justifies pricing these services on the basis of "competitive necessity." Thus, Southwestern Bell set rates for Customer Alerting and Menu Server based on its perception of the competitive market price. [126] Southwestern Bell responds to (c) only by stating that it has always maintained a parity between its intrastate and interstate packet switching rates in the past, and it should be allowed to continue to do so in the future. [127]

66. Discussion. In the Part 69 ONA Order, we required carriers who file BSE rates to provide cost support as is required by the Commission's price cap rules. Packet switching services are excluded from price cap regulation. [128] Thus, our price cap rules do not govern interstate packet switching service filings, and our packet switching cost support requirements do not change simply because these services are offered as BSEs. Therefore, Southwestern Bell is required to provide cost support for its packet switching BSE rates similar to the cost support required of other packet filings.

67. The Bureau designated these rates for investigation because Southwestern Bell did not

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[125] Southwestern Bell Direct Case at 9-10.

[126] Id. at 11-15.

[127] Id. at 15-16.

[128] LEC Price Cap Order, 5 FCC Rcd at 6810, para. 195.

provide any of the workpapers with Transmittal 2146 from which it derived its packet switching BSE cost figures, and thus did not comply with Section 61.38 of the Commission's Rules governing packet switching. [129] Southwestern Bell argued that its cost support was adequate because that cost support was similar to the cost support it submitted in conjunction with another packet switching filing in the past, Southwestern Bell's MicroLink II service. [130] The Bureau concluded that the prior packet switching filing cited by Southwestern Bell was not relevant because that cost support was filed under a waiver of our cost support rules. [131]

68. The Bureau has misconstrued Southwestern Bell's packet switching waiver. The BSEs at issue in Transmittal 2146 are new BSEs to be available with Southwestern Bell's MicroLink II service. [132] In the Southwestern Bell Protocol Conversion Waiver Review Order, we found that the detailed cost support requirements of Section 61.38 were not necessary with respect to MicroLink II service, because market conditions at that time made it unlikely that Southwestern Bell would be able to engage in anti-competitive or otherwise improper pricing, and Section 61.38 cost support would be of little value in promoting our pro-competitive policies. [133] Nothing has occurred in the packet switching services market that would lead us to revise these conclusions today. The packet switching services market is still highly competitive. Furthermore, in the Part 69 ONA Order, we have adopted policies which permit competition to an even greater extent than was possible at the time of the Southwestern Bell Protocol Conversion Waiver Review Order. [134] For these reasons, and because none of the intervenors argued against Southwestern Bell's direct case on this issue, we determine that our waiver of Section 61.38 cost support rules for Southwestern Bell's MicroLink II service should be extended to the nine BSEs in Southwestern Bell's Transmittal 2146. [135] We also conclude that the cost support filed by Southwestern Bell for Transmittal 2146, as supplemented by its direct case, is adequate in light of this waiver.

2. Southwestern Bell Access Service Request

69. Southwestern Bell plans to require IXCs to submit an access service request (ASR) to order BSA/BSE combinations. In the ONA Investigation Order, the Bureau was concerned that

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[129] ONA Investigation Order, 7 FCC Rcd at 1518, para. 36.

[130] ONA Investigation Order, 7 FCC Rcd at 1518, para. 35. See Southwestern Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis, 5 FCC Rcd 161, 162, para. 5 (1990) (Southwestern Bell Protocol Conversion Waiver Review Order). See also Southwestern Bell Telephone Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis, 2 FCC Rcd 20 (Com.Car.Bur. 1987) (Southwestern Bell Protocol Conversion Waiver Order), review denied Southwestern Bell Protocol Conversion Waiver Review Order, 5 FCC Rcd 161 (1990).

[131] ONA Investigation Order, 7 FCC Rcd at 1518 n.32.

[132] Southwestern Bell Telephone Company, Transmittal 2146 Description and Justification (D&J), at 1-1 (filed Nov, 1, 1991).

[133] Southwestern Bell Protocol Conversion Waiver Review Order, 5 FCC Rcd at 164, para. 19.

[134] Specifically, the rules adopted in Part 69 ONA Order were designed to permit BOCs to compete with independent ESPs on an integrated basis, and at the same time prevent BOCs from engaging in unreasonable discrimination. Part 69 ONA Order, 6 FCC Rcd at 4525, para. 2.

[135] The Commission has authority to grant waivers on its own motion under Section 1.3 of its rules, 47 CFR § 1.3, if there is "good cause" to do so.

Southwestern Bell's ASR requirement might impose unnecessary additional costs on its customers at the time they order ONA services. [136]

70. Southwestern Bell maintains that use of ASRs is not a new requirement imposed for ONA, but is the standardized vehicle developed by the Ordering and Billing Forum (OBF) that applies to all access services. Southwestern Bell participated in OBF planning for ONA and claims no participant raised objections to using established access ordering procedures for ONA services. Southwestern Bell also states it uses ASRs as tracking documents that enable it to comply with Commission requirements for annual reports on ordering and installation intervals for ONA service ordered by Southwestern Bell affiliates. According to Southwestern Bell, any alternative to ASRs would likely be a burdensome non-automated mechanism. [137] Finally, Southwestern Bell notes that its tariff establishes a procedure for converting customers from feature group services to ONA on July 1, 1993, when feature group services are scheduled to be eliminated. This procedure occurs automatically without requiring customers to submit ASRs. [138]

71. According to Sprint, the OBF was intended to develop a uniform ASR document and procedures, not ONA implementation plans of individual companies. Sprint maintains that the tariff review process, not the OBF, is the proper forum for considering ONA conversion plans. [139] It is not clear to Sprint why only Southwestern Bell requires ASRs, or why converting from Feature Group service to the equivalent BSEs and BSA involves anything more than a record change. [140] Sprint recalls that it proposed allowing customers to submit letters to BOCs describing which circuits to convert. Sprint also maintains that Southwestern Bell said it might consider accepting ASRs on a per-LATA or a per-customer basis. [141]

72. Southwestern Bell has explained that its tariff permits converting from Feature Group services to the equivalent BSEs and BSA without requiring ASRs. Southwestern Bell has also established that its use of ASRs is a standard method for ordering services, which has been developed in an appropriate industry forum. Southwestern Bell has also shown that taking orders for ONA services without ASRs would be very burdensome, because it would preclude Southwestern Bell from using the computerized procedures it has developed for filling orders for other services. Alternatively, Sprint has not provided a good reason for the Commission to interfere with the OBF and extend regulation into an area in which we have not exercised our jurisdiction. Nor has Sprint explained why automatic conversion at the time Feature Group service offerings are eliminated is not a reasonable alternative. Accordingly, we conclude that Southwestern Bell's use of ASRs does not impose unnecessary additional costs on ONA customers, and that this is not an unreasonable practice.

3. Ameritech Call Detail Recording Tariff

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[136] ONA Investigation Order, 7 FCC Rcd at 1521, para. 67.

[137] Id. at 16-20.

[138] Southwestern Bell Reply at 15. See Part 69 ONA Order, 6 FCC Rcd at 4528, para. 20 (Feature Group service offerings are to be eliminated when the BOCs incorporate their BSE rates into their price caps.)

[139] Sprint Opposition at 7-8.

[140] Id. at 9.

[141] Id. at 10 n.12.

73. The Bureau directed Ameritech to explain why its Call Detail Recording (CDR) BSE was not a detariffed billing and collection service. Ameritech argues that, "[w]hile call detail reports may be used for billing and collection purposes, it is not identical to [Ameritech's] billing and collection service."[142] Ameritech asserts that CDR was developed on a Feature Group-specific basis to provide ESPs with specific kinds of call detail they requested in the ONA proceeding. Ameritech maintains that billing and collection service is different because Ameritech's billing and collection service records all the customer's traffic, is not Feature Group-specific, and contains additional call detail necessary for billing purposes.[143] Ameritech also notes that CDR was included in its ONA plan approved by the Commission.[144]

74. We have defined billing and collection as "recording [interexchange carrier (IC)] message detail, aggregating the details to create individual messages (a completed call originated by an IC's end user), applying the IC's rates to such messages, processing these rated messages into customer invoice form, mailing bills, collecting payments, accepting customer deposits, handling customer inquiries and investigating billing evasion activities."[145] This definition does not exclude call detail recording done on a Feature Group-specific basis, or call detail recording tailored to the specific needs of ESPs. Ameritech admits that its CDR service "may be used for billing and collection purposes."[146] For these reasons, we conclude that Ameritech's description of CDR does not adequately distinguish this service from the services we detariffed in the Billing and Collection Order. Therefore, Ameritech is required to remove material regarding CDR service from its tariff.[147]

B. Non-designated Issues

1. Adequacy of SCIS Redaction II

75. Background. The SCIS Disclosure Order ordered Bellcore to make available to intervenors in the investigation a version of SCIS with proprietary information redacted from the model and documentation, and also established procedures by which parties in the ONA

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[142] Ameritech Direct Case at 10.

[143] Id. Ameritech does not specify in its direct case what this additional information is, or what kind of billing it is collected for.

[144] Ameritech Direct Case at 10-11.

[145] Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, 1151 n.2 (1986) (Billing and Collection Order). The Commission did retain Title I jurisdiction over call detail recording services, but only until 1989 or conversion to equal access, whichever came later. See Billing and Collection Order, 102 FCC 2d at 1174, Ameritech ONA Tariff Order, 7 FCC Rcd at 261-62, para. 34.

[146] Ameritech Direct Case at 10.

[147] We also note that Ameritech has requested a waiver to withdraw lineside CDR from its ONA plan. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 7 FCC Rcd 811, 812, para. 4 (Com.Car.Bur. 1992). We have stated that we would "not look favorably upon the BOCs' withdrawal of services that were approved in their ONA plans." Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 6 FCC Rcd 7646, 7653, para. 10 (1991). Thus, Ameritech requested a waiver of the Part 69 ONA Order to withdraw lineside CDR from its tariffs, because it was still conducting tests for that service. The Bureau granted this waiver on a tentative basis pending the outcome of this investigation. The Commission hereby finds Ameritech's petition for waiver regarding this service moot.

tariff investigation may examine this redacted version of SCIS. [148] The redacted model and procedures were expected to permit the maximum extent of public participation in the ONA tariff investigation consistent with adequate protection of proprietary materials. [149]

76. Pleadings. Several intervenors assert that the information made available to them does not permit them to fully participate in the investigation.[150] Ad Hoc asserts that more than competitively sensitive information has been redacted.[151] Some parties believe they should be permitted to see SCIS inputs to determine whether they are reasonable. [152] Many intervenors complain that, because they were allowed to examine one version of the model for only one switch type, they were not permitted to see the effect of different SCIS versions or different technology mixes on SCIS outputs. [153] Sprint alleges that there may be "stand alone" modules of SCIS or SCM used to develop BSE rates that were not provided to intervenors. [154]

77. Ad Hoc and Sprint argue that redactions should be unnecessary for intervenors signing nondisclosure agreements. [155] MCI contends that the restriction against signatories to the nondisclosure agreement communicating with each other is unreasonable. [156] Ad Hoc asserts that its examination of Redaction II was unnecessarily hampered by Bellcore's provision of a slow computer, and by software that seemed to "bomb" after five or six SCIS runs. [157] Allnet complains that it was not permitted to examine Redaction II without first giving up Redaction I. [158] Allnet criticizes the Commission for not "ruling" on the reasonableness of Redaction II

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[148] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Com.Car.Bur. 1992) (SCIS Disclosure Order).

[149] SCIS Disclosure Order, 7 FCC Rcd at 1534, para. 42. Some intervenors alleged that, in Bellcore's initial response, both the software and the documentation explaining operation of the software were so deeply redacted as to be seriously deficient. ONA Rescheduling Order, 7 FCC Rcd at 5307, para. 3. See also MCI Opposition at 29-32. As a result, the Bureau informally encouraged vendors and Bellcore to work toward creating a second redacted model within the general parameters set by the SCIS Disclosure Order. ONA Rescheduling Order, 7 FCC Rcd at 5307, para. 4. A more complete description of this second redacted model, hereafter referred to as "Redaction II," and the associated nondisclosure agreements, are discussed in the SCIS Disclosure Reconsideration Order, which we adopt today. Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, FCC 93-531 (adopted December 2, 1993) (SCIS Disclosure Reconsideration Order).

[150] Sprint Opposition at 1-3; MCI Opposition at 3-4, 33-34; Metromedia Opposition at 4; Ad Hoc Opposition at 6.

[151] Ad Hoc Opposition, Appendix I at 4. See also Sprint Opposition at 5 (details of capital cost calculation and definition of "getting started costs" have been redacted).

[152] Sprint Opposition at 3; MCI Opposition at 28-29; Allnet Opposition at 2-3; Wiltel Opposition at 20.

[153] Sprint Opposition at 3-5; AT&T Opposition at 9-12; Metromedia Opposition at 9-13; Ad Hoc Opposition, Appendix I at 12-13; Allnet Opposition at 6-7; Wiltel Opposition at 19.

[154] Sprint Opposition at 5.

[155] Ad Hoc Opposition at 4-6; Sprint Opposition at 7.

[156] MCI Opposition at 33-34.

[157] Ad Hoc Opposition, Appendix I, at 3-4.

[158] Allnet Opposition at 8-9.

prior to the filing of oppositions to direct cases. [159]

78. Discussion. As a threshold matter, we first conclude that the Bureau properly determined that nondisclosure agreements alone would not be sufficient to protect the vendors' competitive interests or the Commission's interests in program effectiveness, and instead relied on the redaction procedures, coupled with the independent auditor's report and staff review. In our decision in the Allnet Order, [160] we recognized that such determinations involve the exercise of the agency's discretionary disclosure authority rather than FOIA requirements, and so deferred consideration of the discretionary procedures adopted in the Bureau's SCIS Disclosure Order to a subsequent order. We have now reviewed the Bureau's discretionary procedures as finally implemented, and in the companion SCIS Disclosure Reconsideration Order approve those procedures. [161] For present purposes we need only emphasize the record statements that vendors would consider withdrawing or limiting their participation in the SCIS model process if proprietary data were disclosed in full subject only to nondisclosure agreements. The serious implications of such a withdrawal for the effective implementation of ONA were described in the Allnet Order. [162] While cited there to support the program effectiveness prong of Exemption 4 of the FOIA, the implications equally support the Bureau's determination as a matter of discretionary disclosure processes, that nondisclosure agreements would not sufficiently safeguard the ONA implementation process that disclosure of sensitive vendor data, subject only to such agreements, should be required. [163]

79. Redaction II resulted from a compromise designed to allow adequate access to SCIS documentation and software by interested parties without revealing proprietary information used in the model. [164] All the SCIS/SCM redactions were necessary to prevent disclosure of information proprietary to the switch vendors or Bellcore. [165] For example, disclosure of certain elements of the SCIS model could reveal switch design information, or could reveal information regarding negotiated switch prices, which switch vendors consider proprietary. [166] The SCIS

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[159] Allnet Opposition at 8-9. The Bureau concluded in the ONA Rescheduling Order that the proper procedural vehicle for comments on the Redaction II process would be oppositions to the BOCs' direct cases. ONA Rescheduling Order, 7 FCC Rcd at 5308, para. 10. Allnet has provided no reason to question this conclusion.

[160] Allnet Order, 7 FCC Rcd 6329 at n. 7.

[161] *See* n. 149, *supra*. MCI's contention respecting communication between signatories to nondisclosure agreements was also raised in its application for review of the SCIS Disclosure Order, and is considered in the Companion Order.

[162] Allnet Order, 7 FCC Rcd at 6330, para. 17. *See also* Allnet Communications Services, Inc. (FOIA Control No. 92-149), 8 FCC Rcd 5629 (1993).

[163] Unusual procedures were necessary in the ONA context to enable a degree of intervenor access to these proprietary models and proprietary vendor data, including the requirement of an independent review of the software model. While we cannot rule out the prospect that some subsequent rate development method will entail a similar procedure, carriers should not routinely support proposed rates through the use of proprietary models or data. This entails substantial additional burdens on carriers, intervenors and Commission staff in order to ensure intervenors maximum access consistent with protection of proprietary materials. Therefore, when carriers rely on such materials to support tariff filings, they bear a substantial, initial burden of demonstrating the circumstances that preclude reliance on publicly available data.

[164] Southwestern Bell Reply, Exh. 1 at 1; BellSouth Reply at 21.

[165] PacTel Reply at 3; Southwestern Bell Reply, Exh. 1 at 2; BellSouth Reply at 20; Ameritech Reply, Att. B at 1-2; Bell Atlantic Reply at 3. See also US West Reply at 8-9.

[166] Southwestern Bell Reply, Exh. 1 at 2; NYNEX Reply, App. at 2; Ameritech Reply, Att. B at 1. See also US West Reply at 13-14.

algorithms must also be kept confidential to protect Bellcore's substantial investment in SCIS, and the income it earns from SCIS licensing fees. [167] Moreover, it is not clear that disclosure of algorithms would help intervenors to determine whether the model calculates switching costs properly. [168] Finally, some intervenors purchase switches from AT&T and Northern Telecom, and providing unredacted SCIS access to these intervenors would give them a particular competitive advantage in negotiations over switch prices. This information is so sensitive in this hotly competitive market that the dangers of disclosure outweigh benefits gained in their release. [169]

80. We conclude that the redactions did not prevent interested parties from making a meaningful review of SCIS for purposes of evaluating the ONA tariffs. The intervenors were able to conduct sensitivity analyses, i.e., to examine how changes in SCIS inputs affect SCIS outputs, on most of the relevant SCIS inputs. These sensitivity analyses, in addition to the information in the Andersen Report, enabled the intervenors to raise specific questions regarding the reasonableness of the cost and rate development. [170] For example, intervenors brought to our attention the issue of the age of traffic data and SCIS versions. [171] Intervenors also raised several specific issues regarding US West's SCM model. [172] We conclude that the restrictions placed by Bellcore and US West on the examination of Redaction II permitted intervenors an adequate opportunity for review. [173]

2. Adequacy of Andersen Report

81. Several intervenors criticize the Andersen Report as either inaccurate or insufficiently detailed. Wiltel criticizes Andersen for concluding that the costing principles inherent in SCIS are reasonable without describing the standards by which those costing principles were evaluated. Wiltel also contends that Andersen did not discuss alleged inconsistencies between the Average Study option in SCIS and the long run incremental cost analysis SCIS is supposed to produce. Wiltel further notes that Andersen never quantified variation in BSE rates due to differences in actual cost characteristics among BOCs. [174] Metromedia and Wiltel complain that Andersen performed sensitivity analyses on the BSEs of all BOCs on an aggregated basis, rather

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[167] Southwestern Bell Reply, Exh. 1 at 3-4; Ameritech Reply, Att. B at 2; NYNEX Reply, App. at 3-4. See also US West Reply at 9.

[168] Bell Atlantic Reply at 3-4.

[169] NYNEX Reply, App. at 3.

[170] See NYNEX Reply, App. at 4; Ameritech Reply, Att. B at 2; Southwestern Bell Reply, Exh. 1 at 4. See also US West Reply at 9-10.

[171] Supplemental Andersen Report, Exh. 5-6; Wiltel Opposition at 30-31.

[172] Supplemental Andersen Report at Exh. 10; MCI Opposition at 32.

[173] We have established in prior Orders that the information in SCIS is exempt from mandatory public disclosure under Exemption 4 of the Freedom of Information Act. 5 U.S.C. § 552(b)(4). See, e.g., Allnet Communication Services, FOIA Control No. 92-266, Memorandum Opinion and Order, 7 FCC Rcd 6329 (1992) (Allnet FOIA Reconsideration Order); upheld, Allnet Communications Services, Inc. v. FCC, 800 F.Supp. 984 (D.D.C., 1992), appeal docketed, Allnet Communications Services, Inc. v. FCC, No. 92-5351 (D.C. Cir. September 25, 1992).

[174] WilTel Opposition at 20-23. See also MCI Opposition, Appendix, at 3-4 (asserting some differences in actual cost characteristics described by Andersen are open to BOC manipulation).

than BOC by BOC. [175] Allnet notes that the Andersen Report found that SCIS/SCM models assume BOCs do not build "more or less capacity than prescribed by engineering rules." [176] Allnet asserts that, because of this assumption, SCIS has little to do with real world costs, and calls this a "fatal flaw" in the model. [177] Allnet alleges that Andersen is biased in favor of the BOCs. [178]

82. Andersen concluded in its report that, although SCIS permits users fairly wide discretion in selecting variables, the SCIS model itself is fundamentally sound. This finding is consistent with the findings of the Commission's review of the SCIS models submitted to us in camera in December 1991. [179] Furthermore, the results of Andersen's analysis were consistent with our conclusions, based on independent staff review, regarding the appropriate treatment for BellSouth's model office development, [180] noncurrent SCIS models and traffic data, [181] average or marginal SCIS studies, [182] and embedded or prospective technology mixes. [183] The staff review process did not duplicate the Andersen effort, but examined proprietary materials from additional or different perspectives. The different emphases of each approach, however, add to the scope of review and enable us to determine, contrary to Allnet's unsupported assertion, that the Andersen study is free of bias.

83. The issues raised by Wiltel regarding sources of BSE rate variation or whether the SCIS Average Study option results in long run rates do not in any way cast doubt on Andersen's conclusion that SCIS is fundamentally sound. In the Supplemental Report submitted at the direction of the Commission staff, Andersen explains in more detail the procedures it used to evaluate SCIS costing principles. [184] We have examined Andersen's supplemental report in light of Commission staff's independent review of the models, and we find this explanation to be adequate. The SCIS model is internally valid; as described above, our concerns and revisions to BOC ratemaking practices involving SCIS-based rates are directed at specific exercises of the discretion afforded carriers by the model, not at the model's internal structure. It is not a criticism of the model proper to constrain the SCIS user's assumptions, or factual inputs, to assure their reasonableness, and we have done so in several respects as summarized in the following paragraph. Finally, Allnet's assertions that BOCs ignore engineering specifications while installing switches, are at best speculative, and do not merit further

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[175] Metromedia Opposition at 13; Wiltel Opposition at 23-29.

[176] Allnet Opposition at 3.

[177] Id.

[178] Allnet Opposition at 2.

[179] SCIS In Camera Order, 7 FCC Rcd at 524, para. 22.

[180] Section III.B.1. of this Order, supra.

[181] Section III.B.2 of this Order, supra.

[182] Section III.C.1. of this Order, supra.

[183] Section III.D.1. of this Order, supra.

[184] Supplemental Andersen Report, Exh. 1-3.

consideration. [185]

V. CONCLUSION

84. In this Order, we have: prescribed that BOCs should base their BSE rates on forward-looking technology mixes; limited presumptively reasonable overhead loadings to reasonable levels; directed that the cost of money factor used to compute unit investment be set equal to the authorized rate of return; directed BOCs to use recent SCIS models and traffic studies when performing investment studies; and prohibited non-uniform overhead loadings based on jurisdictional arbitrage. These decisions have significantly reduced the rate variation in BSE rates of different BOCs, but without unduly limiting the flexibility intended and permitted by our new service rules.[186] The remaining rate variation results from genuine cost differences attributable to differences in demand characteristics or service areas, and is not by itself indicative of unreasonable rates.[187]

85. In this Order, we direct Ameritech, Bell Atlantic, NYNEX, Pacific Bell, Nevada Bell, and Southwestern Bell to recalculate their BSE rates using a cost of money factor no higher than 11.25 percent. We require Ameritech and NYNEX to recalculate their BSE rates using a prospective technology mix. We direct BellSouth to adjust its BSE rates to reflect an administrative overhead factor consistent with the ARMIS-based overhead factor described in Attachment C of this Order, or to provide substantial justification for a different approach. We require NYNEX to set its Three Way Calling BSE rate no higher than its total unit costs for that BSE. We direct Ameritech to withdraw its CDR BSE from its tariff. With respect to US West, we have concluded that its BSE rates filed on November 1, 1991, based in part on SCIS and in part on SCM, are inconsistent with the Part 69 ONA Order requiring BSE rates to be developed using a consistent methodology, and with our requirement that up-to-date software be used for investment studies. We also direct US West to recalculate these rates, based on representative model offices, and an administrative overhead factor consistent with the ARMIS-based overhead loading factor test described in Attachment C of this Order, or to provide substantial justification for a different approach.

VI. ORDERING CLAUSES

86. Accordingly, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, WE FIND that the Open Network Architecture rates of the Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company, and US West Communications, Inc., ARE UNLAWFUL for the period those rates were in effect.

87. Accordingly, IT IS ORDERED that Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, Southwestern

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[185] Allnet Opposition at 2.

[186] For a discussion of the relevance of BSE rate variation, see Section III.A. of this Order, supra.

[187] Ameritech Reply at 2; PacTel Reply at 1-2; Southwestern Bell Reply at 8; NYNEX Reply at 6; Bell Atlantic Reply at 4.

Bell Telephone Company, and US West Communications, Inc., SHALL FILE tariff revisions reflecting our findings in this investigation, as specified in paragraph 85 of this Order, no later than 10 days from the release date of this Order. For this purpose, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 93-1163.

88. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 205, WE PRESCRIBE that carriers implementing Open Network Architecture requirements shall base their ratemaking process on their estimate of the prospective (i.e., replacement) investment necessary to provide and maintain these services, rather than embedded or booked costs associated with existing plant.

89. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as specified herein, to effect the decisions set forth above.

90. IT IS FURTHER ORDERED that the motion to accept late filed pleading, filed by the American Telephone and Telegraph Co., IS GRANTED.

91. IT IS FURTHER ORDERED that the motion to accept late filed pleading, filed by the Metromedia Communications Corporation, IS GRANTED.

92. IT IS FURTHER ORDERED that the motion to accept late filed pleading, filed by the Williams Telecommunications Group, Inc., IS GRANTED.

93. IT IS FURTHER ORDERED that a waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, IS GRANTED to Southwestern Bell Telephone Company with respect to its packet switching BSE rates filed in Transmittal No. 2146.

94. IT IS FURTHER ORDERED that the petition for waiver of the Part 69 ONA Order filed by Ameritech Operating Companies, IS DISMISSED AS MOOT.

95. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 92-91 IS TERMINATED, with respect to the Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Parties Filing Direct Cases
May 18, 1992

The Ameritech Operating Companies (Ameritech)

The Bell Atlantic Telephone Companies (Bell Atlantic)

The BellSouth Telephone Companies (BellSouth)

The NYNEX Telephone Companies (NYNEX)

Pacific Bell

Nevada Bell

Southwestern Bell Telephone Company (Southwestern Bell)

US West Communications, Inc. (US West)

Parties Filing Supplemental Direct Cases

Nevada Bell

Parties Filing Oppositions to Direct Cases
October 16, 1991

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communication Services, Inc. (Allnet)

American Telephone and Telegraph Company (AT&T)

General Services Administration (GSA)

MCI Telecommunications Corporation (MCI)

Metromedia Communications Corporation (Metromedia)

US Sprint Communications Company Limited Partnership (Sprint)

Williams Telecommunications Group, Inc. (WilTel)

Parties Filing Replies
November 13, 1992

Ameritech

Bell Atlantic

BellSouth

NYNEX

PacTel (Joint Reply filed by Pacific Bell and Nevada Bell)

Southwestern Bell

US West

ESTIMATED EFFECT OF COMMISSION ECONOMIC DETERMINATIONS ON BSE RATES AND VARIANCE

	DESCRIPTION	MULTILINE HUNT GROUP UCD LINE HUNTING	AUTOMATIC NUMBER IDENTIFICATION	MULTILINE HUNT GROUP	MAKE BUSY KEY
1	ORIGINAL RATES * (LN 10, COL 1)	$6.18	$0.000547	$1.24	$54.89
2	REVISED RATES (LN 11, COL 1)	$6.18	$0.000334	$1.26	$44.75
3	DIFFERENCE (LN 2 – LN 1)	0	($0.000213)	$0.02	($10.14)
4	PERCENT CHANGE (LN 3 / LN 1)	0	–39%	2%	–18%
5	STATISTICAL VARIANCE; OPRIGINAL RATES**	65.97	2.6E–07	0.34	346.39
6	STATISTICAL VARIANCE; REVISED RATES	51.97	.662E–07	0.1	77.65
7	PERCENT CHANGE (LN 6 – LN 4) / LN 4	–21%	–75%	–71%	–78%
8	CONTRIBUTION TO TOTAL BSE REVENUES ($)	$61,267	$32,103,742	$250,963	$287,553
9	CONTRIBUTION TO TOTAL BSE REVENUES (%)***	0.18%	94.87%	0.74%	0.85%

NOTES:
The revised rates include the following revisions where applicable:

1. Cost of money is reduced to 11.25 percent.
2. Voluntary BOC corrections.
3. Prospective switching technology.
4. Current version of SCIS.

* TRP rates have been adjusted to reflect the same rate structures, e.g., Ameritech for Multiline Hunt Group provides a rate for a group of lines, whereas the other BOCs offer Multiline Hunt Group on a per line basis. For this analysis, Ameritech's rate was adjusted to reflect a per line rate.

** Variance is a statistical measure computed by summing the squares of the difference between individual values and their average and dividing by the number of values.

*** The total anticipated revenue for all BSEs is $47,196,178 however the percentages are based on $33,839,056. The difference results from excluding as an outlier Ameritech's Called Directory Number Delivery VIA 900 NXX BSE with estimated revenues of $13,357,122.

SOURCE: Independent Review of SCIS/SCM; Supplemental Sensitivity Analyses, January 14, 1993, Runs 1 and 4.

Attachment C

1. The Common Carrier Bureau has analyzed the data provided by the BOCs in their Open Network Architecture (ONA) filings and in their direct cases in response to the ONA Investigation Order[1] in support of rates for basic service elements (BSEs). These data include investment, direct costs, and overheads associated with providing BSEs on a per unit basis. These data were analyzed as described in this Attachment to assess the reasonableness of the BOCs' BSE rates.

2. The instant order requires that BOCs make various adjustments to their SCIS models and the post-SCIS treatment of investment. The Bureau believes that when the BOCs refile cost support in accordance with these requirements, the unit investments will be reasonable. Moreover, in several instances, we have determined that the direct costs and overheads proposed by the BOCs are overstated.

3. The Bureau evaluated the relationship of direct cost to direct investment for the BSEs.[2] Although we authorized some carrier flexibility in costing methodology in the Part 69/ONA Order[3], we are concerned that in many instances BOCs provide direct costs ratios that appear higher than their historical levels. We do not find adequate explanation in either the filings or direct cases and we have therefore sought some other method to identify reasonable costs.

4. The most reliable information before us on relationships between direct costs and direct investment is in the ARMIS database. As a basis of comparison, the Bureau computed ratios of direct cost to direct investment from data for the local switching element in ARMIS.[4] While

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[1] See 7 FCC Rcd 1512, Common Carrier Bureau, 1992 (ONA Investigation Order).

[2] Companies are required, as part of their new services showing, to provide us with these ratios.

[3] See 6 FCC Rcd at 4531.

[4] The Bureau computed the direct costs, total costs, and investment from ARMIS using data from ARMIS charts 43-01 and 43-04. Plant costs were developed using plant amounts reported in ARMIS chart 43-04,

the cost categories in ARMIS are not specifically identified as direct costs or overheads, analyses of the costs claimed by the companies reveals that some categories can be identified exclusively as either direct costs or as overheads, while some categories include both kinds of costs.

5. The direct costs for the local switching element in ARMIS include, at a minimum, the plant specific expenses, depreciation, return, and taxes associated with central office equipment, information/origination termination equipment, and cable and wire facilities. Overhead costs include the plant specific expenses, depreciation, return, and taxes associated with general support facilities, and the two categories of expense reported in ARMIS as Customer Operations-Marketing and Corporate Operations expenses. The only other categories of expenses in ARMIS are the Plant Non-specific and Customer Operations-Services categories. These categories in ARMIS contain both direct and overhead expenses. Because these two categories contain both direct and overhead costs, we computed an upper limit of the direct cost to direct investment ratio from this data, assuming all of the costs in these categories is direct cost.

6. Although the ratio of direct costs to direct investment may vary among services in a category, this upper limit should be large enough to capture all but the most unusual cases. Therefore, we believe that this upper limit ratio appears to be the maximum reasonable ratio of direct cost to investment for any individual service included in a category, absent a justification from the company.[5]

7. Reasonable overhead loading factors were estimated in a similar

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computed at the authorized rate of return of 11.25 percent. Taxes were computed at the tax rate implicit in the ARMIS report. Since the ratios derived from ARMIS data appear to be fairly consistent over time, the analysis used data for 1991, the latest year available.

[5] The results, using the ANI BSE as an example, are displayed on the following chart. Refiled rates for all BOCs should not reflect direct costs and overheads ratios greater than the upper limits reflected on the chart.

manner. As explained above, there are two categories of costs that contain both direct and overhead costs. We computed an upper limit of overhead cost to total cost from this data, assuming all of the costs in these categories are overhead costs. The ratios of the total costs for BSEs to the direct costs were computed to determine the overhead loadings factors used by the BOCs. We compared these ratios to the upper limit of the ratio of the switching costs to direct switching costs computed from ARMIS.

8. The new services showing allows companies to set their rates at direct costs plus reasonable overhead loadings. We believe the upper limit overhead loading factor computed from ARMIS is the maximum overhead loading which is reasonable, absent further explanation by the companies. Companies have offered no explanation for the need for greater than normal overhead loadings in the case of ONA. Therefore, as explained in text, the companies' overhead loadings will be limited to the benchmark computed from the ARMIS data absent a justification for any greater loadings.

Attachment C

Chart

AUTOMATIC NUMBER IDENTIFICATION (ANI) RATIOS FOR DIRECT COSTS & OVERHEADS

($ THOUSANDS)

	CLASSIFICATION	AMERITECH	BELL ATLANTIC	BELLSOUTH	NEW YORK	NEW ENGLAND	PACIFIC	NEVADA	SOUTHWESTERN	US WEST
1	ARMIS DIRECT COST / DIRECT INVESTMENT UPPER LIMIT (LN 33 / 32)	26%	27%	27%	29%	N/A	27%	29%	23%	23%
2	BOC DIRECT COSTS / DIRECT INVESTMENT RATIOS FOR ANI (TRP CHART RATIO)	27%	33%	30%	30%	N/A	30%	31%	27%	28%
3	ARMIS TOTAL COSTS / DIRECT COSTS RATIO UPPER LIMIT (LN 39 / 34)	N/A	N/A	158%	N/A	N/A	N/A	N/A	N/A	200%
4	BOC TOTAL COSTS / DIRECT COSTS RATIO FOR ANI (TRP CHART UNITLN 9 /LN 7)	N/A	N/A	317%	N/A	N/A	N/A	N/A	N/A	234%

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-548

In re Application of	)	
	)	
Iowa State University	)	
Broadcasting Corporation	)	BALCT-921006KF
(Assignor)	)	
	)	
and	)	
	)	
Capital Communications	)	
Company, Inc.	)	
(Assignee)	)	
	)	
For Assignment of License of	)	
Television Station WOI-TV,	)	
Ames, Iowa	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1993 **Released:** December 15, 1993

By the Commission: Chairman Hundt not participating; Commissioners Barrett and Duggan concurring and issuing separate statements.

1. The Commission has before it for consideration: (a) an application to assign the license of station WOI-TV (Channel 5, ABC), Ames, Iowa, from Iowa State University Broadcasting Corporation (Iowa State) to Capital Communications Company, Inc. (Capital); (b) a petition to deny filed by Neil Harl, President, Iowans for WOI-TV, Inc. (petitioner); (c) a joint opposition filed by Iowa State and Capital; and (d) other responsive pleadings. Capital is controlled by Philip Lombardo (Lombardo), who also controls Citadel Communications, Ltd., the licensee of television station KCAU-TV (Channel 9, ABC), Sioux City, Iowa.[1] Because the Grade B contours of the television stations overlap, Capital has requested waiver of Section 73.3555(b) of the Commission's Rules, the duopoly rule, which generally prohibits common ownership of television stations when their respective Grade B contours overlap.

Petition to Deny

2. In assessing the merits of a Petition to Deny, the Commission is guided by Section 309(d)(1) and (2) of the Communications Act, as analyzed in Astroline

[1] Citadel is also the licensee of television stations WVNY, Burlington, Vermont; KCAN, Albion, Nebraska; and WMGC, Binghampton, New York.

Communications Co. v. F.C.C., 857 F.2d 1556 (D.C. Cir. 1988). First the Commission determines whether the petitioner has made specific allegations of fact that, if true, would demonstrate that grant of the application would be prima facie inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it, including information provided by the applicants, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the public interest.

3. In the petition to deny, the petitioner argues that if the sale were to be approved, Iowa State University and its students would be deprived of valuable educational experiences in broadcast journalism, meteorology education, electronic media studies, advertising, theatre and engineering. The petitioner notes, in that regard, that Capital will not provide the studio time and production experience that the television station routinely has made available for these activities. The petitioner also points out that the revenues the station produces would be lost to the University.[2]

4. In their joint opposition, Iowa State and Capital assert that the petitioner's concern that the University will lose valuable support for its educational programs is not within the province of the Commission, nor does the Commission determine whether a sale of a broadcast station to a qualified buyer should be denied so that the current licensee may be forced to continue its operation on the assumption that it will continue to provide a superior nonbroadcast service than the proposed buyer. Further, they state that Section 310(d) of the Act specifically precludes the Commission from considering any party other than the proposed purchaser. MMM Holdings, Inc., 4 FCC Rcd 8243, 8244 (1989). In any event, the applicants note, as disclosed in their asset purchase agreement, Capital has made commitments to continue a variety of programs for the benefit of the University and its students.

Discussion

5. While it appears that the operations of WOI-TV will not be as closely associated with the activities and programs of the University, we find that this fact does not raise a prima facie question as to whether a grant of the instant application would deserve the public interest. We agree with Iowa State and Capital that the loss or gain of educational opportunities for University students or the loss of financial assistance to the University as a

[2] Initially, the petitioner noted that the Iowa District Court of Judicial District 2B held that the contract for the sale of WOI-TV was null and void and ordered that the action taken by the Iowa State Board of Regents regarding the sale be reversed and that the agreement be stricken. However, the District Court's ruling was appealed to and, on November 24, 1993, was reversed by the Iowa Supreme Court. Accordingly, the State's legal ability to sell WOI-TV is not in question here.

result of the subject sale are matters beyond the scope of relevant issues in this proceeding.[3]

6. Additionally, the petitioner contends that a major source of funds for Capital's purchase of WOI-TV is reported to be Mario Gabelli, a media investor who is the subject of a Federal Communications Commission proceeding. Since the petitioner is unsure of the precise nature of Mr. Gabelli's ownership in Capital, it believes that Mr. Gabelli's involvement with Capital in conjunction with the Commission's proceeding raising questions concerning whether his present ownership interests violate the multiple ownership rules in turn raise serious questions regarding the financial and character qualifications of the applicant.

7. In response, the applicants contend that the petitioners have cited no rule or statute that demonstrates that there would be a violation of federal law by Mr. Gabelli. With respect to his involvement in the acquisition of WOI-TV, they note that Mr. Gabelli is minority shareholder in Capital by virtue of his interest as an officer, director and shareholder of Lynch Corporation, which owns Lynch Entertainment Corporation II, which in turn will own 49 percent of Capital. They state that the controlling 51-percent interest in Capital will be held by Lombardo Communications, which is 100 percent owned by Philip Lombardo. As a result, they maintain that Mr. Gabelli's interest is nonattributable pursuant to Note 2(b) of Section 73.3555 of the Commission's Rules, no matter the outcome of the Commission's investigation of Mr. Gabelli.

8. Regarding Mr. Gabelli, we note that he was the subject of a Commission proceeding concerning his attributable ownership interests in broadcast media that exceed limitations imposed by the Commission's multiple ownership rules. Pinelands, Inc., 7 FCC Rcd 6058 (1992); Mario Gabelli, Order to Show Cause, 7 FCC Rcd 5594 (1992). However, that proceeding has been terminated based on a Memorandum of Understanding entered into by the Mass Media Bureau and Mr. Gabelli and approved by the presiding Administrative Law Judge. That memorandum required Mr. Gabelli to come into compliance with the Commission's Rules by September of 1993. Mario Gabelli, MM Docket No. 92-201, FCC 92M-1066 and FCC 92M-1067. By letter dated September 7, 1993, counsel for Mr.Gabelli informed the Mass Media Bureau that he and his respective investment funds now were in compliance with the Commission's multiple ownership rules.

9. Further, the petitioner has not set forth any facts suggesting that Mr. Gabelli's existing media interests are not in full compliance with our rules. Moreover, we find that the acquisition of WOI-TV by Capital is not prohibited

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[3] We note, nonetheless, that Capital has agreed in the contract of purchase to continue to provide the facilities of WOI-TV for training internships and educational opportunities to graduate and undergraduate students of the University. Capital has also represented that it and the University will meet no less than annually to review the effectiveness of these activities and make any changes or improvements that might be beneficial to Capital and the University.

because of Mr. Gabelli's proposed minority stock interest in Capital. In amending the Commission's multiple ownership rules in 1984, the Commission determined that when there is a single majority shareholder that controls a corporate applicant for a broadcast license, the minority shareholder's or shareholders' interests are not considered attributable for multiple ownership purposes. Note 2(b) of Section 73.3555 of the Commission's Rules. The Commission concluded that in these circumstances the minority shareholder or shareholders, even acting together, would not be able to direct the affairs or activities of the licensee. Attribution of Ownership Interests, 97 FCC2d 997, 1008-9 (1984), recon. in part, 58 RR2d 604, 621-22 (1985), further recon., 1 FCC Rcd 802 (1986).

Waiver of the Duopoly Rule, Section 73.3555

10. Capital requests waiver of Section 73.3555(b) of the Commission's Rules, the duopoly rule. As noted above, KCAU-TV (Channel 9, ABC), Sioux City, Iowa and WOI-TV (Channel 5, ABC) Ames, Iowa, will be commonly controlled by Lombardo if Capital's acquisition of WOI-TV is approved. Capital notes that the Grade B contours of KCAU-TV and WOI-TV overlap and that Section 73.3555(b) of the Commission's Rules prohibits ownership of television stations when their respective Grade B contours overlap. Capital asserts that because the nature of the overlap is de minimis, and because the requested assignment would increase the diversity of broadcast voices in Ames, waiver of the rule is appropriate, citing Shareholders of Storer Communications, Inc., 59 RR2d 611 (1985); Thomas J. Flatley, 7 FCC Rcd 4242 (1992).

11. In support of its request for waiver, Capital has submitted an engineering study demonstrating that the stations are licensed to communities that are approximately 165 miles apart, that the overlap area is more than 60 miles from the community of license of each television station, that the overlap area only encompasses 236 square miles (1.3% of the area within KCAU-TV's Grade B contour and 1.2% of the area within WOI-TV's Grade B contour), and that the overlap area only encompasses 3,665 people (0.6% of the population within KCAU-TV's Grade B contour and 0.4% of the population within WOI-TV's Grade B contour).

12. Regarding the overlap area, Capital notes that there are a significant number of competing television stations serving the overlap area of WOI-TV and KCAU-TV, which it characterizes as rural in nature and sparsely populated. The overlap area, according to Capital, comprises small portions of Calhoun and Crawford counties and even smaller portions of Sac and Carroll counties small parts of which are included within three Arbitron ADI's. Calhoun and Carroll are part of the Des Moines ADI, Sac is part of the Sioux City ADI and Crawford is part of the Omaha ADI (Omaha is the 73rd largest television market). Capital asserts that the overlap area is served, in whole or in part with Grade B contour coverage by the following stations: KTIV, Sioux City (NBC); KTIN, Fort Dodge (noncommercial); KCCI-TV, Des Moines (CBS); KDIN-TV, Des Moines (noncommercial); WHO-TV, Des Moines (NBC); WOWT, Omaha (NBC); KETV, Omaha (ABC); and KMTV, Omaha (CBS). Thus, Capital contends, the overlap area is served by a number of competing television stations and the people located in the overlap area have access to goods and markets in Des Moines, Omaha and Sioux City.

13. Additionally, Capital avers that KCAU-TV and WOI-TV serve separate and distinct markets where there are other competing stations; Sioux City is ranked as the 138th largest television market and Ames-Des Moines is ranked as the 66th largest television market. Capital notes that in Sioux City, KCAU-TV competes with KMEG (Channel 14, CBS), KTVI (Channel 4, NBC) and KSIN (Channel 27, PBS); and in Ames, which is part of the Des Moines area of dominant influence, WOI-TV competes with KCCI-TV (Channel 8, CBS), KDSM-TV (Channel 17, Fox), WHO-TV (Channel 13, NBC), and KDIN-TV (Channel 11, PBS). In addition, Sioux City is served by 9 radio stations and Des Moines is served by 19 radio stations.

14. Further, Capital believes that no detriment should arise from the common ownership because both television stations presently are ABC affiliates and already broadcast virtually the same programming comprising the bulk of each station's general program fare. Capital also notes that another ABC affiliate (KETV, Omaha) provides service to the overlap area. Moreover, because the overlap area is very minor, Capital contends that any loss of diversity would be offset by significant benefits to all viewers in both markets because the stations will continue to broadcast "material of local interest to their discrete markets (such as public service announcements and news programming). As a further benefit, Capital argues that common ownership would allow each television station to perform more of the market-specific services more effectively because the stations can share certain administrative and news gathering costs. Even though there will be cost sharing, Capital represents that "both stations will operate independently with full studio facilities and that local management will independently make day-to-day decisions regarding programming and advertising." In this later regard, Capital represents that neither KCAU-TV or WOI-TV will solicit advertisers in the overlap area.

15. The petitioner submits that the overlap is not de minimis and that Capital's showing falls short of the standard used by the Commission in approving duopoly waivers in the past. Specifically, the petitioner contends that Capital has provided no support for its claim that substantial service benefits will accrue from increased efficiency and cost savings as a result of sharing certain administrative and news gathering costs. It avers that there is no indication that the cost savings to be realized will be used to increase public service programming. The fact that WOI-TV and KCAU-TV are ABC affiliates, the petitioner argues, means that they will target their programming to an ABC audience (youngsters and young adults) and that common ownership will result in duplication and reduction of voices in the overlap area and a reduction in WOI-TV's local programming. In that regard, the petitioner points out that presently (TV Guide, week of September 18, 1993) KCAU-TV broadcasts 9 hours of locally produced programming per week and WOI-TV broadcasts 18 hours of locally produced programming per week. The locally produced programming, the petitioner asserts, includes local news and public affairs, as well as children's and teen programming. Apparently relying on the assertedly fewer number of hours of local programming aired by the assignee's station, KCAU-TV, the petitioner believes that the amount of news, public affairs and children's programming broadcast by WOI-TV would be reduced if the subject assignment application were granted.

16. Additionally, the petitioner asserts that the waiver should not be approved because the circumstance presented here does not involve a failing station, Taft Broadcasting Partners Limited Partnership, 7 FCC Rcd 2854 (1992), Thomas J. Flatley, 7 FCC Rcd 4242(1992). Likewise, the petitioner argues, this is not a case of two independent stations having no group ownership features proposing to merge, Weigel Broadcasting, 4 FCC Rcd 6200 (1989); a waiver to permit a facility improvement for one of the stations, Southern Oregon Broadcasting Co., 9 FCC2d 241 (1967); or a case where the resulting diminution of diversity and competition is outweighed by the public interest benefits to be achieved, Citadel Communications Company, Ltd., 8 FCC Rcd 855 (1993).

17. Further, the petitioner notes that the Commission has undertaken an inquiry regarding changes in the video market place, citing Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, 7 FCC Rcd 4111 (1992). The petitioner believes that, until the proposed changes in the rules become final, waivers should only be granted when there is a clear showing that it is in the public interest. The petitioner contends that this has not been shown here and that the application should be denied.

18. In its opposition, Capital states that the "insignificant Grade B overlap in a sparsely-populated area," which is more than sixty miles distant from each of WOI-TV's and KCAU-TV's communities of license, poses no threat to diversity or competition. According to Capital, University publishes a student newspaper which is circulated not only among the University's 27,000 students, but also among Ames' approximate 20,000 nonstudent residents. The University also owns or control three noncommercial educational radio stations located in Ames. Capital argues that the instant assignment of WOI-TV would reduce the media reach of state-controlled University. Capital also denies the allegation that there will be no cost savings and increased efficiencies and asserts that the allegation is unfounded. Moreover, it asserts that it will meet its programming obligations as licensee of WOI-TV, broadcasting a variety of news, public affairs, childrens and other programming responsive to the needs and interests of its community. With respect to the belief that WOI-TV, under Capital's operation, will not broadcast the same level of news and informational programs as presently televised, Capital maintains that such comparison is incompatible with Section 310(d) of the Communications Act, citing Valley Telecasting Co. v. F.C.C., 338 F.2d 278, 279 (D.C. Cir. 1964), and MMM Holdings, Inc., above.

19. As to competition in the overlap area, itself, Capital states that eight other stations serve all or part of this area, which comprises portions of four counties and three Arbitron areas of dominant influence. It also reiterates that there will be no solicitation for advertisers in the overlap area by either WOI-TV or KCAU-TV in the future, noting that there has not been any in the past.

Discussion

20. The ultimate objective of the duopoly rule, as well as of the other multiple ownership rules, is to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power. Multiple Ownership Rules, 22 FCC2d 306, 307 (1970), recon. granted in part, 28 FCC2d 662 (1971). In adopting the duopoly rule's fixed standard of prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited common ownership of television stations serving "substantially the same service area." Multiple Ownership of Standard, FM and Television Broadcast Stations, 45 FCC2d 1476, 1476 n.1, recon. in part, 3 RR2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." Id. at 1479 n.12; John Hay Whitney, 28 FCC2d 736, 752 (1971). Accordingly, the Commission has granted waivers of the duopoly rule where signal overlap is de minimis, see, e.g., Hubbard Broadcasting, Inc., 2 FCC Rcd 7374 (1987), or where the public interest benefits to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. See, e.g., Capital Cities Communications, Inc., 59 RR2d 451, 465 (1985)(applicant proposed to provide special programming to areas without their own local VHF service). The fact that we have released a Notice of Proposed Rulemaking regarding changes in the video market place does not require us to defer action on this waiver request.

21. As for the de minimis overlap standard, our past waiver cases have generally characterized this as an overlap area representing less than one percent of both the area and the population within the Grade B contour of each station. E.g.,, Hubbard Broadcasting, Inc., 2 FCC Rcd at 7374; Acadian Television Corp., 51 RR2d 743, 746 (1982); KSOO-TV Inc., 43 FCC2d 879, 880 (1973). In the case before us, we note that the extent of the overlap area, as determined by the standard prediction model, falls short of our strict definition of de minimis. However, the geographic area is well within the range of our past waiver cases, while the corresponding populations are each less than one percent, one of the smaller percentage combinations of any non-de minimis duopoly case in which we have granted a waiver. See, e.g., Sunshine Television, Inc., 8 FCC Rcd 4428 (1993)(overlap encompasses 0.52% and 0.45% of the area and .62% and 1.15% of the population within the respective Grade B contours of the stations); Thomas J. Flatley, 7 FCC Rcd 4242 (1992)(where the overlap accounted for .99% of the area and .27% of the population of one station and 2% of the area and 1.13% of the population of the other station). Thus, while not constituting a strict de minimis overlap situation, this combination would fall well within the Commission's recent decisions regarding the minimum overlap permitted in a duopoly context.

22. We find that any detrimental effect of the minimal overlap present here is outweighed by the public interest benefits to be gained from a waiver of the duopoly rule. The separation of commercial station WOI-TV and University's three noncommercial educational radio outlets will increase the number of separately owned broadcast voices available in Ames, Iowa, an area with a population of approximately 47,000 people. In making our determination, we also consider such factors as the number of media voices in

the overlap area, the distinctiveness of the respective markets, the independence of the stations' operations with regard to programming and advertising, and the concentration of economic power. First, viewers in the overlap area will receive a diversity of voices, specifically another ABC, three NBC, and two CBS affiliates, in addition to two noncommercial stations. Seven of these stations serve various parts of the overlap area, whereas KTIV provides a competing commercial service to all of the overlap area. And Capital's pledge to maintain both WOI-TV and KCAU-TV as separate ABC affiliates further protects the Commission's diversity objective.[4]

23. We are also persuaded that another Commission objective, the prevention of undue concentration of economic power, will not be compromised by the common ownership of WOI-TV, Ames (the 66th largest television market), with KCAU-TV, Sioux City (the 138th largest television market), which is 144 miles away. It does not appear that either ABC affiliate has competed for viewers in the overlap area and Capital has pledged that neither will do so in the future. In any event, the presence of another ABC affiliate providing Grade B service to the overlap area should ensure continued competition in the area. Consequently, we are persuaded that granting Capital a waiver is clearly in accord with factors developed in past duopoly cases and fully consistent with the objectives of the multiple ownership rules. We further find that the applicants are fully qualified and that a grant of this application would serve the public interest, convenience and necessity.

24. Accordingly, IT IS ORDERED that the petition to deny filed by Neil E. Harl on behalf of Iowans for WOI-TV, Inc. IS DENIED; that the request of Capital Communications Company, Inc. for waiver of the duopoly rules, Section 73.3555(b), to permit common ownership of television stations WOI-TV and KCAU-TV, IS GRANTED; and that the application for consent to the assignment of license for WOI-TV from Iowa State University Broadcasting Corporation to Capital Communications Company, Inc. (BALCT-921006KF) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

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[4] We find petitioner's beliefs as to the possible reduction in the amount of time devoted by WOI-TV to news and other informational programming to be predicated on conjecture and surmise. Most importantly, Capital has acknowledged its obligations, as a broadcast licensee, to be attentive and responsive to the issues confronting the Ames, Iowa community.

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Assignment of Television Station License WOI-TV, Ames, Iowa

This Memorandum Opinion and Order grants a request for waiver of the Commission's television duopoly rules in order to allow common ownership of WOI-TV in Ames, Iowa and KCAU-TV in Sioux City, Iowa.

Prior to Pegasus[1], waivers were only granted in instances where: (i) the overlap of the relevant service area was de minimis; (ii) the combination would improve service to an unserved or underserved area; or (iii) the waiver would preserve a failing system. I am troubled that in recent matters[2], we have manipulated our ownership rules in order to carve out exceptions to the Commission's pre-Pegasus policy. In effect, the Commission continues to circumvent its rulemaking proceeding via the waiver process. In my opinion, the Commission's efforts are misplaced. I continue to believe that our rulemaking proceeding is the proper forum for considering modifications to the Commission's pending multiple ownership rules.

Despite my misgivings, the circumstances in this case sufficiently mirror past de minimis matters. Therefore, I concur in the decision in the Memorandum Opinion and Order.

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[1]See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett)

[2]See In re: Act III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett). See also Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett- Concurring in Part) and H & C Communications, Inc., 73 RR2d 1108 (1993)(Concurring Statement of Commissioner Andrew C. Barrett)

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re Applications of Iowa State University Broadcasting Corporation and Capital Communications Company, Inc., for Assignment of License of Television Station WOI-TV, Ames, Iowa

While the diversity interests served by approving this duopoly waiver are not as substantial as in previous instances, I am willing to support the grant of this application because of the minimal overlap of the Grade B contours of the television stations involved. Therefore, for the reasons that I stated in Sunshine Television, Inc., 8 FCC Rcd 4428, 4443 (1993) (Separate Statement of Commissioner Ervin S. Duggan), I concur in the result.

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